JD–52–11
Columbus, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CENTER CITY INTERNATIONAL TRUCKS, INC.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, DISTRICT LODGE 54, LOCAL LODGE 1471

Cases 9-CA-45338
9-CA-45402
9-CA-45437
9-CA-45820
9-CA-45975
9-CA-46081
9-CA-46136
9-CA-46183

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LLC), of Cincinnati, Ohio, for the Charging Party.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. This matter arises out of an order consolidating cases, order revoking settlement agreement, and consolidated complaint and notice of hearing (complaint) issued on January 28, 2011, against Center City International Trucks, Inc. (the Respondent or the Company), stemming from unfair labor practice (ULP) charges filed by International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 54, Local 147 (the Union). The complaint alleges that the Respondent violated Section 8(a)(3), (5), and (1) of the Act, by conduct related to ongoing negotiations that began in September 2009 for a succeeding collective-bargaining agreement.

Pursuant to notice, I held a trial in Columbus, Ohio, from April 4–8 and May 17–19, 2011, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. As of May 19, 2011, the parties continued to engage in collective bargaining.

Issues

1. Did the Respondent, on November 30, 2010[1] discharge journeyman mechanic Russ Mason,[2] a member of the Union's negotiating committee, for the stated basis of failing to timely reacquire his commercial driver's license (CDL), or because of union animus?

[1] All dates hereinafter occurred in 2010, unless otherwise indicated.

[2] Hereinafter, he will be referenced as "Mason," and Attorney Ronald Mason as "Attorney Mason."

2. Did this constitute a unilateral change in the Respondent's policy regarding discipline of mechanics for losing a CDL?

3. Did the Respondent's refusal to reemploy Mason after he reacquired his CDL constitute a unilateral change in the Respondent's policy?

4. Did the Respondent, on January 27, issue a written reprimand to journeyman mechanic Jeff Ward, a member of the Union's negotiating committee, for the stated basis of tardiness, or because of union animus?

5. Did Manager Dan Shepherd violate Section 8(a)(1) when he stated that Ward was receiving the reprimand because of the Respondent's dislike of the Union's stance on attendance/tardiness during the course of negotiations?

6. Did the Respondent, on about November 24, 2009, announce a unilateral change to its policy of allowing employees to carry over 3 days of vacation leave into the following year without restriction as to dates of use?

7. Did the Respondent, after September 24, fail and refuse to timely provide the Union with information that it requested regarding employees' health Insurance benefits?

8. Did the Respondent, on November 1, unilaterally implement new health insurance benefits?

9. Did the Respondent, on March 12, April 2, and July 16, issue memoranda to employees that misrepresented the status of negotiations, disparaged the Union so as to undermine employee support for the Union, and/or interfered with the Union's internal processes?

10. Did the Respondent, during the period from January 20, 2010 through February 28, 2011, fail and refuse to bargain in good faith, by its conduct set out in paragraphs 5–8 above; by repeatedly submitting its prior proposals in response to new union proposals; by giving perfunctory consideration to and/or failing to consider union proposals; by proposing, in bad faith, elimination of the union-security provision and voluntary check-off clause; and by its "overall conduct"? In sum, did the Respondent engage in bad-faith or surface bargaining?

On April 22, the Regional Director approved a bilateral informal settlement agreement encompassing Ward's reprimand, Shepherd's statement, and the change in policy on carryover vacation days.[3] He later revoked that agreement on the basis of the Respondent's alleged post-settlement violations of the Act. The correctness of his revocation is not before me.

Witnesses and Credibility

The following witnesses testified on the General Counsel's behalf: Mason and Ward; Business Representative Mark Chema and Grand Lodge Representative William Rudis; journeyman mechanic Joseph Gerchy; leadman mechanic William Graves; mechanic Robert Romine; and mechanic John "Jack" Danhauer and job applicant Barak Dorr, whose testimony

[3] GC Exh. 21.

was limited to their interviews for employment (in reference to the Respondent's proposals to eliminate union-security and dues-checkoff provisions).

The Respondent called the following managers/supervisors: General Manager James Ray and Service Manager Dale Mosholder, who testified about Mason's discharge; retired Service Manager Jay Shepherd, who testified about Ward's reprimand and how the union-security clause and dues-checkoff provisions impacted on the Respondent's ability to recruit mechanics; Assistant Manager Joel Crist, who attended Ward's reprimand meeting; Senior Administrator Diane Taylor, who testified about records pertinent to Mason's and Ward's disciplines; Parts Director Pat Pesta, who testified on the subject of negotiations concerning health insurance benefits; and Government Sales Manager Nick Wahoff, who testified about negotiations concerning health insurance benefits and the information that the Respondent provided to the Union on the subject. The Respondent also called Attorney Ronald Mason, who attended bargaining sessions on its behalf.

Some facts, such as the proposals that the parties exchanged during negotiations, are undisputed. Further as to bargaining, four sets of notes taken at negotiations were admitted into evidence, with the understanding that none of them purported to be verbatim accounts of everything that was said. The first was Attorney Tulencik's detailed typewritten notes of negotiations that he attended from September 9, 2009–December 8, 2010.[4] The second was Wahoff's typewritten notes for meetings from January 20–28, 2011 at which Tulencik was not present.[5] The third was Gerchy's handwrote notes for meetings from January 20–28, 2011.[6] The fourth was Mason's handwritten bargaining notes for July 22 and November 7, 2010.[7]

I have no reason to doubt the overall accuracy of the notes. Significantly, Tulencik's and Wahoff's notes of certain pivotal meetings were not necessarily inconsistent with Gerchy's and Mason's. As a general proposition, contemporaneous written notes are more reliable than later recollection, and I take this into account in making findings of fact as to what was said during bargaining. More specific to this case, neither Tulencik's nor Gerchy's notes appear to have excised or sugarcoated what was said in the clearly intense and often heated negotiations, in which accusations of bad faith and improper conduct repeatedly flew back and forth, interspersed with ad hominem attacks. This is an appropriate point to reiterate what I stated at trial: the only allegations of bad-faith bargaining before me are on the part of the Respondent, despite its continuing contention that the Union engaged in such. Nonetheless, I will consider the Union's conduct to the extent that it bears on the issue of surface bargaining.

In contrast to the 8(a)(5) allegations, determining the merits of the 8(a)(3) charges, especially Mason's termination, hinges largely on credibility resolution.

Mason was not a stellar witness in that he did not seem fully forthright at times during cross-examination, particularly as to why he delayed getting his CDL after he became eligible in July. I attribute part of this to a natural and understandable reticence to answer questions about the marital and financial difficulties that he was experiencing. However, he appeared candid for the most part and was consistent in relating events that took place on the job regarding his CDL. In any event, the defects in his credibility paled in comparison to the conflicting and unbelievable testimony of Ray and Mosholder on the matter, which I will subsequently detail. I also note that the Respondent did not call Owner Tim Reilly, who Ray testified played a role in Mason's

[4] R. Exh. 1, 344 pages.

[5] R. Exhs. 2–8, covering meetings from October 5–January 21, 2011.

[6] R. Exh. 264, 196 pages (excluding legends page).

[7] R. Exh. 278.

discharge and who Ward testified made post-discharge statements about Mason. I draw an adverse inference that his testimony would not have supported and, indeed, might have contradicted the Respondent's proffered version of what occurred. See *International Automated Machines*, 285 NLRB 1122, 1122–1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988) ("[W[hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.").

Danhauer displayed obvious reticence, even antagonism, on the General Counsel's direct examination, reflecting a clear reluctance to testify. The affidavit he gave to the General Counsel on November 9,[8] with his personal attorney present, was not fully consistent with the later affidavit that he gave to the Respondent's counsel on March 31, 2011,[9] concerning what he stated about union dues and checkoff at one of his interviews for employment. The former was closer in time to the interview, he swore to it when he had his own legal representation, and he affirmed its version in his testimony. I therefore believe his NLRB affidavit and testimony to be more reliable and credit their account over the second affidavit.

Other witnesses on both sides appeared generally credible, given natural difficulties of precise recall, especially when having to address events that in some cases occurred as far back as September 2009, and/or involved numerous details. I also recognize the normal tendency to hear, remember, and recount conversations in a light most favorable to the witness, which in some cases may diminish the reliability of the testimony but not necessarily reflect dishonesty. In a couple of particular instances, I have credited one witness over another for the reasons stated.

I find it appropriate here to cite the well-established precept that "'[N]othing is more common in all kinds of judicial decisions than to believe some and not all' of a witness' testimony." *Jerry Ryce Builders,* 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). The trier of fact must consider the plausibility of a witness' testimony and appropriately weigh it with the evidence as a whole. *Golden Hours Convalescent Hospitals,* 182 NLRB 796, 787–799 (1970).

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, as well as the thorough post-trial briefs that the General Counsel and the Respondent filed, I find the following.

Background

At all times material, the Respondent has been a corporate entity engaged in the sale, service, and maintenance of tractor trailers and buses at its facilities located in Pataskala and Columbus, Ohio (the East and West Facilities, respectively). The Respondent has admitted jurisdiction, and I so find.

The Respondent employs about 100 employees, of whom 30–35 are in the following unit that the Union has represented for decades: all full-time and regular part-time mechanics, leadmen, mechanic's helpers, and mechanic's apprentices employed at the two facilities.

[8] GC Exh. 18.

[9] R. Exh. 257.

The most recent collective-bargaining agreement was effective from November 1, 2006 to October 31, 2009 (the agreement).[10] Pursuant to its article 31, both parties gave timely notice of termination. The parties subsequently agreed to extend it for 2 weeks. Bargaining over a succeeding contract commenced on September 9, 2009, and has continued to date.

Article 7 of the agreement sets out disciplinary procedures, providing in relevant part that discipline can be imposed in the form of a warning, suspension, or discharge, and that in general progressive discipline will be imposed for minor offenses. The Employee Handbook (handbook) also has a provision on discipline, providing for oral or written warnings, probation, suspension without pay, or immediate termination, depending upon the facts and circumstances, with each situation to be considered "in light of a variety of factors including, but not limited to, the seriousness of the situation, the employee's past conduct and length of service, and the nature of the employee's previous performance or incidents involving the employee."[11] These are the only written instruments setting out the Company's disciplinary policies.

Article 10 of the agreement provides for a probation period of 60 calendar days, subject to a 30-calendar days' extension by mutual agreement if requested by the Company. Employees retained after their probationary period are considered permanent.

Other provisions of the agreement will be set out as they specifically apply to Mason's discharge and Ward's reprimand.

Mason's Discharge

Before setting out my finding of fact regarding Mason's discharge, I will explain why I do not credit either Ray or Mosholder on what occurred and the reasons for the discharge.

Evaluating whether a witness' demeanor reflects negatively on his or her credibility is not always easy. However, my observations of Ray and Mosholder lead me to believe that they were uncomfortable at not being candid. Ray is a manager over approximately 100 employees, and I would expect him to be more accustomed to speaking in public situations, such as a trial setting. Yet, he appeared uneasy throughout his testimony, especially when he was testifying about the circumstances behind his averred decision to discharge Mason. Interestingly, Mosholder seemed quite comfortable as he testified—until he was asked about the events of November 30, at which point he clenched his hands on the witness stand, and his relaxed manner markedly changed.

Demeanor aside, neither Ray nor Mosholder were reliable witnesses. Their testimony contained internal inconsistencies, they were not fully consistent with one another, aspects of their testimony did not gibe with the Respondent's actions, and portions of their testimony were incredible. In this regard, I bear in mind that the Respondent admittedly allowed Mason to continue working for nearly 17 months after he lost his ability to drive vehicles that required a CDL.

The following are flaws in Ray's testimony that undermine my faith in his credibility. Ray's testimony of why he made the decision in late October to issue a letter giving Mason 30 days to get his CDL or face termination (a 30-day letter) was ambiguous: "It was becoming

[10] GC Exh. 2.

[11] GC Exh. 17 at 24.

apparent to me that progress was not being made. . . . During the time period leading up to that, he had even taken a week off with . . . the full intent intention of gaining the CDL, but didn't happen. That was kind of a determining factor."[12]

Ray first testified that the Company allowed Mason to continue to work after issuance of the 30-day letter, rather than be suspended without pay as was the normal practice, because he was a member of the Union's bargaining committee and "we wanted to be absolutely sure" that he was "treated fairly."[13] On cross-examination, Ray offered different reasons for Mason's special treatment: to avoid financial hardship to Mason and based on "his value to the company as an employee."[14] However, this testimony that the reason was to avoid financial hardship to Mason was inconsistent with his earlier testimony indicating that he did not know of Mason's financial difficulties until after the discharge.[15]

Ray testified on direct examination that he had the authority to fire and was the one who made the decision to terminate Mason. His answer to the question of why he made that decision was vague to the point of meaningless:[16]

> You know, I've—I'm a manger that has 99 other people that—that report to work to that building every day. And at some point when I give a specific employee specific instructions with a specific time frame and a specific outcome if they don't do it, they really leave me no choice. Because if I don't take action in that case, I really lose control in all cases. And if don't have a standard, I have no standards.

His testimony that he made the decision was further undermined by his testimony on cross-examination that, prior to the discharge, he consulted with Reilly.[17] He provided no specifics of what they said to one another. As noted, the Respondent chose not to have Reilly testify.

Ray further testified that he first learned from Mosholder as they were going into the termination meeting that day, that Mosholder had given Mason permission to use a company truck on December 1 and that Mosholder had suspended him effective December 1 until he got the CDL.[18] This testimony was inconsistent with both his testimony and Mosholder's that Mosholder kept him well informed on a regular basis of what was going on with Mason's CDL.[19] As Mosholder put it, they talked about Mason "Every other day."[20] Rather incredibly, Ray also testified that learning these facts had no impact on his decision.[21]

Too conveniently, Ray could not recall when he last spoke with Mosholder about Mason prior to November 30, testifying that he "may have" spoken with him within a week" thereof.[22] He further testified that during the 30-day period, Mosholder reported that Mason was not

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[12] Tr. 855.
[13] Tr. 851.
[14] Tr. 879–880.
[15] Tr. 862.
[16] Tr. 857.
[17] Tr. 875, 881–882.
[18] Tr. 858.
[19] Tr. 848–849, 883, 885, 1400–1401, 1437.
[20] Tr. 1437.
[21] Tr. 860.
[22] Tr. 886.

making progress;[23] Mosholder, however, testified that Mason informed him that he had a scheduled driving test on December 1.

On direct examination, Ray did not testify at all about a conversation with Mosholder on the morning of November 30. Only on cross-examination did he state that at some point prior to 1:45 p.m. that day, Mosholder recommended that Mason be terminated.[24] Suspiciously, he could not provide a precise time, any other specifics, or even where the purported conversation occurred.[25] On the other hand, Mosholder testified as follows.[26] That morning, they had a conversation in Ray's office about what to do that day with Mason. They reviewed what had transpired and determined that they had given Mason 145 days to obtain his CDL (I question whether they would have had to do this if, as they both testified, they were in regular and frequent contact about Mason and his CDL). At the conclusion of the meeting, Ray stated that he wanted some time to think of what his response would be that day.

Mosholder's testimony was also faulty for many reasons. First, when Mosholder started working for the Company on July 27, 2009, Ray told him that Mason had lost his CDL. I find wholly unbelievable Mosholder's testimony that at least 70 percent of Mason's duties required a CDL. Had that been the case, it is inconceivable that Mosholder would have treated Mason's lack of a CDL so cavalierly and waited until October 29 of the following year to issue him a 30-day letter. This is especially unfathomable in light of Mosholder's following testimony. He had three journeyman mechanics under his supervision in July, two of whom had CDL licenses. In late July, when one of the two quit, he hired as a replacement a journeyman mechanic who did not have a CDL (Cary Reaves). Thus, by Mosholder's own testimony, he had only one mechanic who could perform CDL work—despite his testimony that at least 70 percent of their work necessitated possession of such a license.

In this regard, Mosholder testified about this situation as it existed when he held a staff meeting on September 7: "[T]he one mechanic was doing all the work, and the other two were, I wouldn't say not doing work, but they were not—they were getting out of having to go out on lots and do different things like that." [27] If at least 70 percent of the mechanics' work required a CDL, then I must seriously question why the Respondent would have been willing to keep Mason and Reaves on the payroll.

Mosholder's calendar has notations suggesting conversations with Mason about the CDL on six dates prior to October 30 (from July 8 to October 29).[28] However, his following testimony causes me to doubt what he said about their contents, except to the extent that Mason corroborated him. Thus, the notation for July 8 clearly has the word "money."[29] Yet, Mosholder testified "'Monday,' is what it's supposed to be" and explained that the following Monday Mason was going to have the answer of why his CDL was not returned back to him with his regular driver's license.[30] Several factors lead me to believe that this testimony was wholly contrived: after a year of Mason's not having a CDL, such testimony makes no sense on its face; when Mosholder initially related the July 8 conversation, he testified that Mason said he

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[23] Ibid.
[24] Tr. 893–894.
[25] Tr. 894–895.
[26] Tr. 1409, et. seq.
[27] Tr. 1384.
[28] R Exh. 277.
[29] R Exh. 277 at 1.
[30] Tr. 1439.

was now eligible for his CDL and would be working on getting it;[31] and Mason and Mosholder had no conversation on the following Monday.

Mosholder's testimony that on the morning of November 30, he recommended that Mason be discharged does not gibe with the fact that he issued Mason a suspension that afternoon and said that he could still use a company vehicle to take the test. This is especially so because Mosholder testified that Ray was "on the same page basically" as far as terminating Mason.[32] If, indeed, Ray told Mosholder in the morning that he (Ray) would decide that day and was at least leaning toward discharge, I simply cannot fathom why Mosholder admittedly took the actions he did later that afternoon without waiting to hear Ray's decision.

Accordingly, for all of the reasons stated, I do not credit Ray or Mosholder as far as their internal communications concerning Mason or the reasons they proffered for his discharge. As facts, I find the following.

Mason was employed from July 22, 2000, until his discharge on November 30, or over 10 years. At the time of his termination, he was a journeyman mechanic (also called journeyman technician) at the West Facility in the Idealease side, one of three under the direct supervision of Mosholder, who reported to Ray. He worked the first shift, 7 a.m. to 3:30 p.m., Monday through Friday. Idealease is a component of the Company that works on trucks that are leased and rented to customers, as opposed to the International side, which works on customer-owned trucks. It also performs contract maintenance on customer-owned vehicles.

Mason has served and continues to serve in a number of union positions. He has been vice president of the local Lodge and delegate to IAM District 54 since August, and chief steward for the West Facility since July. Previously, since about July 2009, he was the alternate steward. He also attended bargaining sessions on a regular basis from September 2009, until approximately August.

Article 29 of the collective-bargaining agreement (GC Exh. 2) provides:

> [A]ny new employee . . . will have up to ninety (90) days to apply for [a CDL]. If said employee has not applied for a CDL License within this time frame, said employee will be sent home and not allowed to return to work at the Company until they [sic] comply. The Company and/or the Union can request a thirty (30) day extension. All union members shall maintain a current CDL and physical card. . . .

The Company has no other written rules or policies addressing the CDL requirement. Both Gerchy and Ray testified that the disciplinary procedures set out in article 7 of the collective-bargaining agreement do not apply to the CDL provision.

As a mechanic for Idealease, Mason went out to customers' locations to work on their trucks. His job duties included performing preventive maintenance, which encompassed oil changing and checking brake linings and tire pressure; and repairing or replacing engine components. After completing repairs, he routinely road-tested a truck to make certain that the problems were corrected. For vehicles over approximately 26,000 gross vehicle weight, including tractors and certain straight trucks, a CDL was needed in order to road test them. Mason testified that 90 percent of his work was mechanical, 10 percent road testing, and that

[31] Tr. 1370, 1372. Mosholder also testified that he informed Ray of this on the same day. Tr. 1372.

[32] Tr. 1412.

about 5 percent of the work he did required a CDL license (prior to July 2, 2009.) After the Respondent acquired Dayton Freight as a customer in July, about 20 percent of the trucks were of a CDL size, but most of the work Mason performed on their trucks was on their lot.

Because Mosholder's testimony on the scope of work that required a CDL was unreliable, Mason never drove Dayton Freight vehicles when a CDL was required, and no Idealease technicians who have driven since July 2, 2009 testified about what percentage of their work is CDL, a precise estimate thereof is impossible. Romine testified that mechanics on the West Facility's International side spend approximately 5–15 percent of their time on work requiring a CDL; Gerchy set the amount as 10 percent. The figure may be higher for Idealease mechanics but, if so, the Respondent failed to establish this by reliable evidence.

Mason was in possession of a CDL until July 2, 2009, when he lost it for a year due to a DUI. Mason informed Ray of this the following Monday, Ray responded that this kind of thing had happened in the past and that they would work through it. Ray professed not to recall what was said in the conversation and thus did not deny Mason's account, which I have credited.

Mason's regular driver's license was restored after 9 months, but for restoration of his CDL, he had to retake the written and driving tests after 1 year. During the period that Mason did not have his CDL, he continued to perform all of his functions other than road testing vehicles that required such a license.

In late July 2009, Mosholder arrived as his new supervisor. The following July, they had a conversation about the CDL in the context of the Company's acquisition of a new customer, Dayton Freight, a majority of whose trucks were tractors. Mosholder stated that it would be a good idea for Mason to start looking into reacquiring his CDL. Mason replied that he would.

In another conversation, the date of which Mason could not recall, Mosholder asked where he was with getting his CDL. Mason also recalled a conversation in late September, in which he told Mosholder that he would be taking the written test during his vacation the following week.

Mason testified that he did not immediately take steps to get his CDL because of financial hardship, in particular costs associated with his DUI, including legal fees. He obtained his temporary CDL in October, after passing the written test during a vacation week. It allowed him to drive tractors/large flat trucks as long as someone with a CDL accompanied him in the passenger seat (he never, in fact, drove with anyone else). He advised Mosholder of this after returning to work. Mosholder said "good job" and to work toward the next step, the driving test.[33] Mason replied that he would.

On October 29, Mason met with Mosholder, who said that he needed to get the CDL. Mason replied that he understood that the collective-bargaining agreement required it. Mosholder gave him a letter dated October 30, stating that he had 30 calendar days to acquire a CDL or face disciplinary action up to and including discharge.[34]

In late November, Mason scheduled the driving test for December 1. On about November 28 or 29 (November 24, according to Mosholder), he told Mosholder this and asked if he could use a company vehicle rather than have to rent one (the Company had allowed

[33] Tr. 47.

[34] GC Exh. 3. Mosholder dated it October 30 because that was the end of the month.

employees in the past to do this, saving them an expense that almost doubled the cost of the test). Mosholder replied yes. This fact is undisputed.

On the mid-morning of November 30, Mason returned from a job and reported to Mosholder for his next assignment. Mosholder gave him the key to a brand new cab and chassis and said this was the truck that Mason would be taking for his CDL test the following day and that Mason needed to make certain that it was fully prepared. Doing so took Mason 1–1-1/2 hours. He then went back to Mosholder, who gave him job assignments for the rest of the day.

At about 2 p.m., Mason was working in the shop when Mosholder asked to see him in the latter's office. When there, Mosholder said that since today was the deadline, he could not pay Mason to take the test the following day. Mason replied that he understood and was okay with that. Mosholder also said that if Mason did not pass the test, he would not be able to return to work until he acquired his CDL. Mason responded that he was okay with that and had seen that happen with new hires. Mosholder stated that he did not think Mason would have any problems passing the test and that Danhauer would drive him to the testing facility. It is undisputed that Mosholder said that Mason could still use the company truck to take the test.

Mason returned to the job on which he had been working. Within minutes, Mosholder again came over and asked Mason to accompany him. They went into the conference room at about 3:15 p.m. Mosholder stated that Mason had made a mistake on a job and that it was necessary to get his attention with a reprimand. Mason signed it and went back to work. The Respondent does not contend that this reprimand played any role in the decision to discharge him.

At about 3:35 p.m., at the time clock, Mosholder told Mason that Ray needed to see him. They went to the large conference room in the front of the building. Ray and Mosholder told Robert Romine that he was there solely as a witness. Ray stated that because Mason had not met the deadline set out in the 30-day letter, his employment was terminated. Mason explained that financial hardship had caused his delay. Romine and Mason brought up the fact that Mason had his driving test scheduled the following morning. Ray left and returned with a termination notice, stating what he had said orally.[35] Mason signed it.

A couple of days later, Ward was working when Ray approached and asked how he was doing. Ward replied that the men were extremely upset over Mason's discharge. Ray responded that there were factors about which he could not speak. Ward pointed out that Mason had the CDL test scheduled for the very next day. Ray stated that he was aware of that, but there were factors he could not discuss. About 15 minutes later, Ray returned. He said that if Ward had any further questions about the reasoning for the discharge, Ward had Reilly's cell phone number.[36] Ward asked if Ray was implying that the decision came from a higher up such as Reilly or Attorney Mason. Ray nodded and repeated that there were things about which he could not talk.[37]

Mason filed a grievance on his discharge.[38] The following facts are based on Ward's credible and unrebutted testimony of a conversation he had with Reilly on about the date of the second-step grievance meeting on December 7. Ward was working when Reilly came over.

[35] GC Exh. 5.

[36] Ray confirmed this portion of Ward's testimony. Tr. 870.

[37] Ray did not deny this gesture or these words.

[38] GC Exh. 6.

They talked about business and morale. Ward stated that the men were very irritated with him for firing Mason. He asked Reilly if he knew that Mason had his test scheduled for the very next day. Reilly replied yes. Ward stated that Mosholder had told Mason that if he did not pass, he would have to acquire a CDL before he returned to work. Reilly replied that he did not know such conversation had taken place, but either way, Mason was terminated. Ward said that Mosholder had arranged to use one of their trucks and to have the day off for the test. Reilly responded that he knew that. Ward asked if Reilly would hire Mason back into his same position if he acquired his CDL, as the Company had done in the past. Reilly said no, he could not do it like that any longer, that the Company had to put a stop to rehiring those who did not get their CDL on time. Gerchy's testimony confirmed Reilly's statement regarding the Company's past practice of reemploying mechanics suspended for not having a CDL once they had obtained it.

By January 11, 2011, Mason had passed all components of the CDL test, and he received his license on January 13, 2011. The following day, he sent a letter to Ray by email, fax, and regular mail, enclosed a copy of the CDL, and requested reinstatement.[39] He never received any response.

At the second step meeting on December 7, Ray provided documentation relating to two new employees who received reprimands[40] for not acquiring their CDL pursuant to article 29: David Fyffe and Joseph Oman. The reprimands directed them to receive their CDL's within 30 days, put them on suspension until they obtained such, and threatened them with discharge if they did not.

At trial, the Respondent furnished evidence regarding a third new employee, Josh Rose, who received a reprimand for not having his CDL.[41] He was given until December 31, 2009 to obtain it or face disciplinary action. It is unclear from the record whether he was suspended in the interim. I will credit Mosholder's uncontroverted testimony that Rose received his CDL by the stated deadline and that Reaves quit prior to issuance of a 30-day letter.

The Respondent provided no evidence that any long-term employee, other than Mason, who had and then lost the CDL was discharged. At no time during negotiations did the Respondent propose any change to the language in article 29 or to existing policy regarding its application.

Ward's Written Reprimand

Discipline for attendance is not mentioned in the agreement's article on discipline, in the article on hours of work, or elsewhere in the agreement. On the other hand, the handbook provides that disciplinary action, up to and including termination, can be imposed for unexcused absences or repeated failure to provide timely notice of absence or tardiness.[42] The Respondent maintains no other written policy on discipline for absence/tardiness and utilizes no point system or other method of fixed penalties. Rather, an employee's immediate supervisor has the discretion to determine when to impose discipline for attendance matters. At 6 minutes after the start of the shift time, an employee is considered tardy.

[39] GC Exh. 10.

[40] GC Exhs. 7, 9, dated March 27 and 26, 2008, respectively.

[41] R. Exh. 249, dated December 2, 2009. Mosholder testified that Rose was a new technician who was approaching his 90-day limit. Tr. 1430.

[42] GC Exh. 17 at 12.

Ward has been employed by the Respondent for nearly 7 years and is one of about seven journeyman mechanics on the first shift. At times relevant, Shepherd was his immediate supervisor.

Ward has held several positions with the Union and was chairman of the Union's negotiating committee from the outset of bargaining in September 2009, until he resigned from all union positions in November. In that role he appointed Gerchy, Graves, Mason, and Rodney Schultz as members of the committee. He was the Union's lead negotiator from November 2009 to January, when Chema assumed that role.

On or about July 30, 2008, Shepherd issued Ward a written reprimand for unsatisfactory attendance and punctuality.[43] The Respondent's absentee calendar for Ward for 2008–2009 shows that he was late on August 6, September 11, and October 3, 2008, and on January 9 and 15, April 13 and 22, May 4, 5, and 26, June 2 and 12, July 27, August 31, September 3, and December 18 and 30, 2009.[44] It does not show how tardy he was, and I credit Ward's uncontroverted testimony that he was 5–10 minutes late on those occasions.

The record contains four other written reprimands that Shepherd issued to other employees for attendance/tardiness.[45] He has also given oral reprimands to employees for that reason.

On January 18, the Union made a lengthy information request for a variety of records pertaining to the Company's health insurance program, performance reviews, personnel and attendance policies, and health and safety conditions.[46]

The following facts concerning subsequent negotiations sessions are based on Tulencik's notes, which are very similar to Gerchy's notes and consistent in substance with the testimony of Chema, Gerchy, Graves, Mason, and Ward. At the January 25 negotiating session, during discussion of the above items, Attorney Mason accused the Union of bringing them up to harass the Company, pointing out that none of them were raised in 2009 negotiations. He also stated that "If you wish to play these games we can play these games . . . . You can continue to have us scurry around and gather up documents and we will continue to answer your questions but this has nothing to do with the remaining issues."[47]

At this meeting, Rudis stated that employees complained about disparate treatment by managers. Chema raised the situation of an employee whose performance review indicated that his attendance record met the guidelines, and Chema asked what those guidelines were. After a caucus, Attorney Mason returned and stated the Respondent's attendance policy had never been a problem in the past. At a later point, Mason stated that, basically, service managers used their own discretion in determining what is or is not reasonable as far as absenteeism and tardiness. He further stated that the Respondent had no record of anyone being discharged and that 6 minutes was the guideline for tardiness. He pointed out that there was no written policy but that the Union was talking as though they wanted to go down the road of having a written attendance policy; if so, the Respondent could set up a point system. He

[43] GC Exh. 19.
[44] GC Exh. 20.
[45] R. Exhs. 220, 221, 229, 230.
[46] Jt. Exh. 74.
[47] R. Exh. 1 at 94.

added, "This is a double edged sword. All this discretion and no one has yet to be terminated for an attendance issue. Be darn sure this is the road you want to go down."[48]

On January 26, Ward, whose starting time was 7 a.m., clocked in at 7:06 a.m. The following day, he clocked in at 7:07 a.m.[49]

On January 27, Service Manager Shepherd, in his office, issued Ward a reprimand for attendance; specifically, for being late 2 days in a row, on January 26 and 27.[50] Mason was present as Ward's union representative, and Crist attended as management's witness.

Ward appeared to be a candid witness, and because he had the greatest personal stake in what was occurring, I believe that he naturally would have retained the best recollection of what was said. Moreover, Mason's more abbreviated testimony was similar. Accordingly, I credit Ward's testimony and find as follows.

Shepherd asked if Ward agreed to the arrival times shown in R. Exh. 268, and Ward replied yes. After receiving the reprimand, Ward asked if he was being picked on for being the chief steward, the [negotiating committee] chairman, and "everything that was going on," to which Shepherd replied, "[Y]ou guys can't be starting shit at negotiations and not expect it to trickle down. . . from [my] superiors."[51]

As noted above, Mason's account was similar in substance; to wit, Shepherd said, "[W]ell, you guys want to make an issue of attendance in negotiations, we're going to start enforcing it."[52]

By Shepherd's own testimony, he concededly asked Ward, "Are you trying to make a point with the Union and trying to set me up as a bad manager in the light of the Union and the Negotiating Committee, that I don't discipline on [sic] employees?"[53] Thus, even by his own account, Shepherd admittedly linked the reprimand with the negotiations. Crist did not corroborate Shepherd or refute Ward's version because he testified that he had no specific recollection of the meeting, not even of whether he was there.

Announced Change in Carrying Over Vacation Days

Past practice prior to November 24, 2009, as embodied in article 15 of the most recent collective-bargaining agreement, was that employees could carry over 3 days of vacation leave into any dates the following year.

On November 24, 2009, Ray sent an email to supervisors, stating that employees' use of the carryover days would have to be "by March 31."[54] After Mason saw it on top of his toolbox the same or following day, he asked Ray about it. Ray stated that this was going to be the new policy. Graves also saw the new policy set out, in a document taped on or by the clock that employees used to punch in and out.

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[48] Id. at 96.
[49] R. Exh. 268; Tr. 622, 1202.
[50] GC Exh. 12(b).
[51] Tr. at 624–625.
[52] Tr. 112.
[53] Tr. 1199.
[54] GC Exh. 11.

The Company never notified or bargained with the Union over the change. Ray testified that he promulgated the change in response to a request from the accounting office and a recommendation from HR but that after a ULP charge was filed, he rescinded the change and instructed managers not to implement it.[55] The change was never put into effect.

The Long, Arduous Road of Negotiations

Joint Exhibits 1–195 are stipulated to represent all of the written documents exchanged between the Respondent and the Union pertaining to negotiations through January 28, 2011, including but not limited to all contract proposals and the information requests that the Union made. From the outset, both parties expressly stated that they reserved the right to modify or delete their proposals during the course of negotiations.[56]

After both parties gave timely notice to terminate the existing contract in August 2009, their subsequent correspondence discussed meeting dates, with the Respondent advising the Union that Attorney Mason would be its lead negotiator.[57] Attorney Mason was the Company's chief negotiator until January 2011, when Reilly assumed the role. At various times, Chema, Gerchy, Rudis, and Ward served as the Union's lead negotiator.

The sequence of events that follows is based on the written proposals that were exchanged, as well as the notes I earlier described. I have omitted certain discussions, several meetings, and several information requests that I find unnecessary to describe for purposes of this decision. Nor will I detail all of the acrimonious accusations that flew back and forth almost from the start of negotiations and intensified as time went on. To avoid a needless number of footnotes, when more than one joint exhibit pertains to a particular meeting, their numbers will be set out in a single footnote at the heading of the meeting.

I will not repeat what the parties said on the subject of attendance at meetings prior to Ward's reprimand. Encompassed in this section are facts pertaining to the allegations of unilateral implementation of new health insurance benefits and failure to timely provide the Union with information regarding the same.

September 9, 2009 Meeting

In its first proposal, the Union stated that it was "comfortable with all of the current contract language as is with the exception of the wage levels," and proposed a 5 percent increase on November 1, 2009, and 4 percent increases on November 1, 2010 and November 1, 2011.[58]

The parties discussed the IAM trust fund, in particular its financial situation and the Respondent's liability for withdrawal.

[55] R. Exh. 266, a March 18 email.

[56] See Jt. Exh. 9 at 1, Jt. Exh. 12 at 1.

[57] Jt. Exhs. 4–7.

[58] Jt. Exh. 9.

October 1, 2009 Meeting[59]

In its first proposal, the Company orally proposed elimination of the union-shop and dues-checkoff provisions (articles 2 and 3), as well as the following changes in health and welfare (article 26). In the expiring contract, employees had a monthly copayment of $22.15 for individual coverage, and $56.30 for family coverage, which amounted to 20 percent of the cost. The Respondent proposed a percentage split, with employees paying 30 percent of the premium on the standard plan and all additional costs for the upgraded plan. It further proposed a switch in insurance carrier from Medical Mutual to United Healthcare and provided a comparison of their costs and benefits. The Company also proposed a few modifications in other provisions in the contract. The proposal placed "No change T/A 10-01-09" under articles on which it agreed with the Union that they remain unchanged. Wages were deferred for discussion. The Union made a verbal counter-offer, not agreeing to the Respondent's proposals for an open shop, cessation of dues checkoff, or health insurance but agreeing to some of its more minor proposed changes.

October 5, 2009 Meeting[60]

The Union essentially adhered to its position at the previous meeting; the Company modified its earlier proposal on medical insurance to provide that employees pay 28 percent of the premium for the standard plan. The Union later reduced its wage proposal to 4 percent on November 1, 2009, and 3 percent on November 1, 2010 and November 1, 2011, and proposed that employees pay 27 percent of the premiums for both standard and upgraded plans. Still later in the meeting, the Union proposed that employees pay 25 percent of the premiums for the standard plan, and all additional costs for the upgraded plan.

October 12, 2009 Meeting[61]

The Company agreed to the last union proposal on the costs of premiums for health care insurance, and a tentative agreement was reached on all portions of article 26. However, the Union refused to agree to implementation of the change in insurer on October 15 until there was an agreement on wages, and Attorney Mason declared "an emergency under exigent circumstances" and that implementation would proceed.[62] The Respondent proposed elimination of pension plan contributions ($2.50 per hour) under article 25 and suggested that such moneys could go toward 401(k) plan contributions.[63] The Respondent also made its first written wage proposal at this meeting, proposing $2.55 for the first year, 1 percent the second year, and a wage reopener the third year.

October 15, 2009 Meeting[64]

The Union agreed to delete the pension plan provision, provided that the Company pay all unvested employees all amounts of the hourly wages they had contributed, and return the

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[59] Jt. Exhs. 12, 13.

[60] Jt. Exhs. 18–21.

[61] Jt. Exhs. 23, 24.

[62] R. Exh. 1 at 15. The new health insurance went into effect on November 1, 2009 without the Union's agreement.

[63] R. Exh. 1 at 14.

[64] Jt. Exhs. 25–28.

contribution amount of $2.55 an hour to employees in the form of wages. The Respondent added voluntary dues-check off language. Later in the meeting, the Union reduced its proposed wage increases to 3 percent on November 1, 2009, 2.5 percent on November 1, 2010, with a wage opener on November 1, 2011. The Company responded with a wage proposal of $2.55 for the first year after the unvested employees were refunded contributions on their behalf, 1 percent for the second year, and a wage reopener in the third.

Chema emphasized the importance of union security and dues checkoff to the Union. He also accused the Respondent of using what would be pension contributions to pay for the wage increases.

November 5, 2009 Meeting[65] and Aftermath

The parties agreed, pursuant to the Union's October 22 request, that the current collective-bargaining agreement be extended 14 days, to November 14, 2009. The Union changed its wage proposal in that wages for the third year would be increased 2 percent, and it withdrew its previous pension proposal and replaced it with $2.60 per hour on November 1, 2009, $2.65/hour on November 1, 2010, and $2.70/hour on November 1, 2011. The Respondent proposed that the $2.55/hour wage increase would not go into effect until moneys up to $130,000 was divided among employees who were not vested in the pension plan. The Respondent also raised from 1 percent to 1.5 percent its wage increase offer for the second year. The Union returned to its October 15, 2009 wage proposal, and the Respondent repeated its latest proposal. Finally, the Union submitted a proposal that did not change its previous proposals but added that the agreement would be subject to reopening by either party on November 1, 2010 for purpose of negotiation of health insurance benefits and on November 1, 2011, for the purpose of negotiation of health insurance benefits and wages, with such notice to be given at least 60 calendar days in advance.

Ward asked why the Company felt the need for an open shop, and Attorney Mason responded that skilled mechanics were difficult to obtain and that approximately 25 percent of the applicants did not want to work for the Company when they learned it was a union shop.

On November 6, 2009, Ward requested, as soon as possible, information that included a summary of current medical and other health insurance benefits, the number of unit employees and their dependents in each insurance classification, and a breakdown of total cost coverage for such benefits.[66]

On November 9, 2009, Ward requested an assortment of documents that related to 1) applicants for unit positions who had refused offers of employment because there was a union shop; 2) benefits to the Company from eliminating the IAM pension plan and having employees contribute to 401(k) plans; 3) wages and other benefits, including medical and other health insurance, paid to nonunit employees; 4) how the Company determined a new employee's level of classification; and 5) work rules currently in force.[67]

By letter dated November 19, 2009 to Ward, Attorney Mason stated that the information he had requested would be available at the November 20, 2009 bargaining session. No such meeting in fact took place, but Attorney Mason subsequently furnished information responsive

[65] Jt. Exhs. 31–37.
[66] Jt. Exh. 38.
[67] Jt. Exh. 39.

to the request.[68] As to item 1 above, Attorney Mason represented that over the past 3 years, the Company had interviewed only six of the approximately 18 applicants for unit positions and that it had documentation that two of the six had advised that they did not want to pay union dues: Danhauer and Dorr.[69]

November 12, 2009 Meeting[70]

The Company proposed that the agreement be subject to reopening by either party on November 1, 2011 for negotiation of wages only. The Union changed its pension proposal to provide that pensions for the third year would be determined at the pension reopener, and it modified its reopener language to drop the subject of health insurance and to add the subject of wages. The Company resubmitted its prior offer.

Attorney Mason stated that the Respondent would continue to honor the terms and conditions of employment set out in the collective-bargaining agreement but would no longer deduct union dues effective November 15. The Company, in fact, stopped doing so at the expiration of the agreement.

December 7, 2009 Meeting[71] and Aftermath

The Union changed its last wage proposal to provide for a wage reopener in the second year, instead of a 1.5 percent wage increase. The Respondent proposed $2.55/hour increase the first year and reopeners the second and third years, and added that no pay raises would be retroactive. The Union dropped from 3 percent to 2.9 percent its wage increase proposal for the first year. The Respondent resubmitted its prior proposal.

The Union requested the Company's financial records. Ward stated that the Union was continuing to propose retention of the union-security, dues-checkoff, and pension provisions in the agreement.

By letter dated December 8, 2009 to Ward, Attorney Mason stated that the Company would not produce its financial records because the Company was not claiming economic hardship or inability to pay in response to the Union's proposal for a 2.9 percent wage increase; rather, the Company did not see any reason why it should pay increased wages that would make it less competitive.[72] He accused the Union of engaging in ULP's.

The next day, Ward sent Reilly a "negotiations update and information request," wherein he voiced objections to the way Attorney Mason was conducting negotiations, and requested information pertaining to: 1) business plans and reviews; 2) how removing the IAM pension fund and union-security provisions would benefit employees and the Company; 3) verification that the Respondent's proposed pension payouts to unvested employees were accurate; and 4) labor rates and other charges paid by customers at both locations.[73]

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[68] Jt. Exhs. 43, 44.

[69] Jt. Exh. 44 at 1–2.

[70] Jt. Exhs. 40–42.

[71] Jt.Exhs.45–49.

[72] Ibid.

[73] Jt. Exh. 50. Attorney Mason responded to his by letter dated December 29, 2009 to Ward. Jt. Exh. 69.

December 11, 2009 Meeting[74]

The Union reduced its first-year wage rate proposal from 2.9 to 2.7 percent. The Respondent eliminated language about wage rates not going to effect until unvested employees were refunded. The Union then reduced its first-year wage rate proposal to 2.6 percent. The Respondent resubmitted its prior proposal, the Union reduced it wage rate proposal to 2.5 percent for the first year, the Respondent resubmitted it last proposal, and the Union lowered its first-year wage increase proposal to 2.4 percent. The parties continued to voice their disagreement over union-security and dues-checkoff provisions.

December 14, 2009 Meeting[75]

The Union proposed keeping the status quo for 1 year in union security, union-dues checkoff, job classifications and wages, and pensions; the Respondent resubmitted its last proposal; the Union dropped the wage increase proposal to 2.5 percent; the Respondent resubmitted its last proposal; the Union lowered its proposed wage increase to 2.2 percent; the Respondent resubmitted its last proposal; the Union reduced its proposed wage increase to 2.1 percent; the Respondent resubmitted its last proposal; the Union reduced its proposed wage increase to 2 percent; and the Respondent resubmitted its last proposal.

January 7 Meeting

Chema orally proposed that the Union would accept the Company's proposal, including both health insurance and cessation of the pension plan, if the Company agreed to union-security and dues-checkoff provisions.[76] Attorney Mason checked with "the highest levels of the Company,"[77] i.e., Reilly, and then informed Chema that his offer was rejected.

As detailed hereinafter. the Union subsequently submitted a number of new proposals on matters on which the parties had previously reached TA's.[78]

January 11 Meeting[79] and Aftermath

The Union proposed a wage increase of 2 percent increase effective on November 1, 2009, with COLA's on November 1, 2010 and November 1, 2011, based on the consumer price increase; and staying with the current contract language on pensions. The Respondent resubmitted its last proposal (of December 11, 2009).

By letter dated January 13 to Chema, Attorney Mason accused the Union of engaging in a pattern of delaying negotiations; Chema denied this in a letter dated January 14.[80]

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[74] Jt. Exhs. 51–57.

[75] Jt. Exhs. 59–68.

[76] Gerchy's testimony, Tr. 312, which was consistent with Attorney Mason's account. I credit them over Chema's denial that he said such.

[77] Tr. 1294.

[78] See GC Exh. 15, which lists them.

[79] Jt. Exhs. 70, 71.

[80] Jt. Exhs. 72, 73.

On January 16, Chema made an information request regarding overtime hours from November 1, 2009, through January 17; hourly wage increases since November 24, 2009; vacations taken in 2009; and various types of insurance benefits paid to employees in 2009.[81]

On January 18, Chema made an additional information request, asking for 1) attendance policy and records of employees suspended or terminated for 2007, 2008, and 2009; 2) performance reviews for the same period; and 3) complaints about unsafe conditions and other documents showing such for 2007–2009.[82]

By letter dated January 18, Attorney Mason responded to both requests, stating that some of the information was nonexistent and that available records would be furnished the next day.[83]

On January 22, Chema requested information concerning the Respondent's estimated withdrawal liability from the IAM pension fund and the effect on employees; and detailed information about the Company's 401(k) plan.[84]

On January 25, Chema requested information regarding 1) the Company's estimated liability for withdrawal from the IAM pension plan; 2) its workers' compensation costs since 2007; 3) transfers of unit employees since 2007; and 4) transfer/temporary assignments policies and/or practices.[85] Chema made another information request on January 31, relating to health and safety investigations conducted the Respondent's vendor on about January 29 and thereafter.[86]

January 22 Meeting

The Union brought up what it described as a list of health and safety concerns. The parties also discussed open shop and pensions.

January 25 Meeting

The parties discussed health and safety issues, as well as the Company's policies on attendance.

February 4 Meeting[87]

The Union proposed a new article entitled "Joint Health and Safety Committee." The Respondent resubmitted its last offer.

[81] Jt. Exh. 76. All of the Union's information requests were addressed to Reilly, unless otherwise specified.

[82] Jt. Exh. 74.

[83] Jt. Exh. 75.

[84] Jt. Exh. 194.

[85] Jt. Exh. 77.

[86] Jt. Exh. 78.

[87] Jt. Exhs. 79, 80.

The parties discussed health and safety matters, and pension and 401(k) contributions. Attorney Mason stated that the Respondent would not pay the $1000 the trust fund required to calculate the Company's pension withdrawal liability.

The parties also discussed attendance/tardiness. Rudis accused the Respondent of disparate treatment in discipline for attendance, in particular against the men on the bargaining committee, and Attorney Mason accused the Union, in so many words, of instigating employees to test the attendance policy and "to become a martyr."[88]

February 24 Meeting[89]

The Union proposed a new article, "Attendance at Work," including a schedule of progressive discipline for unexcused absences. The Respondent continued to propose its offer of December 11, 2009. The parties continued discussing attendance/tardiness, alluding to Ward indirectly if not by name.

February 26 Meeting[90]

The Union proposed a new article, "Injured Employee," regarding pay and other benefits for injured employees. The Respondent resubmitted its December 11, 2009 proposal. The parties further discussed health and safety issues. Rudis said to the effect that TA's had no meaning without a full agreement.

March 5 Meeting[91]

The Union proposed a new article, "Discharge and Discipline," articulating a "just and sufficient cause" standard and procedures for its adjudication. The Respondent resubmitted its December 11, 2009 offer. The Union next proposed a new article, "Follow All Work," concerning the temporary or permanent relocation of unit work to other locations, or establishment of such work elsewhere. The Company again resubmitted its December 11, 2009 proposal. The Union then proposed another new article, "Information to be Furnished to the Union," providing that the Respondent furnish a variety of employee records on request.

March 10 Meeting[92] and Aftermath

The Respondent proposed that the first year's wage increase be $2.55 plus a .75 percent increase. The Union proposed a new article, "Attendance Incentive Vacation Time and Pay," providing added vacation time for good attendance, as well as procedures for putting in for vacation time. The Respondent presented what it entitled its "Last and Final," in which it raised the .75 percent increase to 1.25 percent.

[88] R. Exh. 1 at 106.
[89] Jt. Exhs. 82, 83.
[90] Jt. Exhs. 85, 86.
[91] Jt. Exhs. 88–92.
[92] Jt. Exhs. 93–95.

That same day, Chema requested that a representative of KPA, the Company's contracted safety vendor, meet with the Union's negotiating committee and answer questions concerning its safety inspection on about January 29 and thereafter.[93]

Attorney Mason, by letter of March 15 to Chema, advised that the Federal mediator was withdrawing from participation in negotiations, and rejected the Union's request to have a representative from KPA attend negotiations.[94] Chema, by letter of March 18, reiterated the Union's request and set out why.[95] He also requested information regarding unit employees' current contributions to the Respondent's 401(k) plan and unit employees employed for 2008, 2009, and 2010, including classifications and pay.

March 18 Meeting[96]

The Union proposed a new article, "Hourly Job Evaluation Plan," providing a procedure for the Union to play a systematic role in job training, planning, and development. The Respondent resubmitted its last and final offer from March 10. The Union also proposed a new article, "Job Classifications," providing descriptions of each of the 10 job classifications. The Respondent resubmitted its last and final offer of March 10.

The Company's 401(k) plan representative answered questions about the plan.

March 26 Meeting[97]

The Union proposed a new article, "Apprenticeship," which included institution of a joint management-labor apprenticeship committee, as well systemizing their selection and progression. The Respondent resubmitted its last and final offer of March 10. The Union proposed another new article, "Wellness Benefit," providing employees reimbursement for physical fitness services and medical/preventative services. The Respondent resubmitted its last and final offer. The Union proposed a third new article, "Shift Hours," setting out hours of work, including lunch and break times, for the first, second, and split shifts. The Respondent resubmitted its last and final offer.[98]

The Union presented a slide presentation showing what it contended were health and safety deficiencies at the facilities.

April 1 Meeting and Aftermath

The parties discussed prior proposals. Following the meeting, Chema requested documents pertaining to health and safety inspections of the facilities on January 29 and March

[93] Jt. Exh. 195.
[94] Jt. Exh. 96.
[95] Jt. Exh. 97.
[96] Jt. Exhs. 98–101.
[97] Jt. Exhs. 102–105.
[98] Jt. Exh. 107.

29, and thereafter.[99] On April 7, Chema asked for reports relating to those inspections, as well as information pertained to what the Union characterized as health and safety hazards that it had identified.[100]

April 9 Meeting[101]

The Union resubmitted its February 4 proposal for a joint health and safety committee article, and the Respondent again resubmitted its March 10 last and final offer.

April 15 Meeting and Aftermath

The parties discussed health and safety matters. The director of the Machinists' High Performance Work Organization gave a presentation on how his organization could work with management and the Union to enhance employee performance.

Following the meeting, Chema requested the following:[102]

1. April 17 – documents for the past 5 years concerning workers compensation, OSHA reports and other environmental and health records, and equipment inspection and repair reports.

2. April 18 – all evaluations and pay increases since January 1.

3. April 20 – information and access to KPA concerning KPA's inspections on January 29 and March 29, and thereafter; the Company's records of the March 29 inspection; and actions the Company had taken to correct the health and safety defects that the Union had uncovered.

April 22 Meeting and Aftermath

At the meeting, the parties discussed Company policies on performance evaluations and shift transfers.

On April 24, Chema requested performance evaluations for eight-named employees, which Tulencik provided by mail and email on April 28.[103] On April 30, he requested copies of training materials and the timeframe of each training class on hazardous materials.[104]

May 4 Meeting

The parties again discussed performance evaluations and shift transfers. as well as health and safety.

[99] Jt. Exh. 108.
[100] Jt. Exh. 109.
[101] Jt. Exhs. 110, 111.
[102] Jt. Exhs. 112–114.
[103] Jt. Exh. 115.
[104] Jt. Exh. 117.

May 6 Meeting

The Union resubmitted its March 18 proposal on hourly job evaluation plan, based on information that different managers were using different sets of standards.[105] Attorney Mason stated that the current system was fine, and he orally repeated the Company's March 10 final offer.

May 7 Information Request and Response

Chema repeated the Union's requests at negotiations for documents pertaining to the safety and health inspections that were completed at the facilities on about March 29.[106] By letter of May 10, Attorney Mason responded with a reiteration of his response at negotiations: the requested report, prepared in anticipation of possible litigation, was privileged and therefore would not be provided.[107]

May 10 Meeting

The Union proposed a new article, "Sale, Transfer and/or Closure of the Business," providing that the Union receive advance notice of such and that any successor recognize the Union and comply with the terms and conditions of the existing collective-bargaining agreement.[108]

May 25 Meeting[109]

The Company resubmitted its March 20 last and final offer. The Union proposed a revised version of the successorship article that it had presented at the previous meeting. The Company submitted a new proposal on health and safety, including language on formation of a joint safety and health committee. The parties discussed KPA as the Company's safety vendor.

June 4 Meeting and Aftermath

The Union made a counter-proposal agreement (39 pp.) to the Company's proposals through and including June 4, and incorporating all of the Union's proposals to date.[110] Attorney Mason questioned whether this had the result of the parties starting all over. Chema stated that the Union was withdrawing all of the TA's, just as the Company had done.[111]

By June 25 letter, Attorney Mason asked Chema to identify all the changes and/or differences between the expired collective-bargaining agreement, the Union's previous proposal, and the June 4 proposal.[112] Chema responded by letter of June 27, accusing the Respondent of bad-faith bargaining over the past 9 months.[113]

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[105] Jt. Exh. 118.
[106] Jt. Exh. 119.
[107] Jt. Exh. 120.
[108] Jt. Exh. 121.
[109] Jt. Exhs. 124–126.
[110] Jt. Exh. 127.
[111] R. Exh. 1 at 251; Tr. 1052–1053.
[112] Jt. Exh. 129.
[113] Jt. Exh. 131.

June 28 Meeting and Aftermath

Attorney Mason reiterated that the parties were starting over. Chema responded no, that the Union's proposal was a counter-offer that incorporated provisions that brought the contract up to current times and made it consistent with other labor agreements. He also responded that the parties no longer had TA's.

That same day, Chema made an information request asking for 1) any changes in safety and health policies since September 2009; 2) current list of bargaining-unit employees; 3) unit employees who sustained any work-connected injuries or accidents for the last 3 years; 4) workers compensation claims for the last 3 years; 5) costs associated with correction of unsafe conditions since September 2009; 6) attendance records and disciplines for such issued to unit employees since January; 7) disciplines issued since September 2009; 8) unexcused absences since January; 9) starting wage rates of all unit employees and any changes made in wages or job classifications since September 2009; 10) estimated costs of all of the above; 11) costs associating with complying with safety and health standards set by law; and 12) KPA and any other reports identifying unsafe conditions since January, and corrective actions taken by the Respondent to address such.[114]

July 16 Meeting[115]

The Union proposed a new article, "Machinists Custom Choices Worksite Benefits," providing employees with supplemental insurance benefits. The Company made a last and final offer, incorporating all of its proposals through May 25, but withdrawing the joint safety and health committee proposal it had made on May 25.

July 22 Meeting and Aftermath

Attorney Mason stated that the Company's last and final offer remained the same and that provisions that had been TA'ed were now the Company's proposals.

On July 23, Chema requested information relating to safety and health: conditions, violations, training, and reports, including those of KPA.[116] On August 4, Chema requested information relating to instructions and actions the Company had taken since January 10 concerning a variety of safety conditions.[117]

By August 11 letter to Chema, Attorney Mason responded to the Union's information requests of July 22 and 23 and August 4 and 6.[118] He opined that the Union's repeated information requests reflected the Union's engagement in surface bargaining. By letter of August 12, Tulencik provided documents concerning recent safety training.[119]

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[114] Jt. Exh. 130. He repeated this request by a letter of August 6, in which he expanded on some of the information sought. Jt. Exh. 138.

[115] Jt. Exhs. 132–133.

[116] Jt. Exh. 135.

[117] Jt. Exh. 137.

[118] Jt. Exh. 139.

[119] Jt. Exh. 140.

By August 19 letter, Chema contended that the Company's responses to portions of the information requests concerning safety and health and wages and job classifications were incomplete, and he reiterated those requests.[120]

August 19 Meeting[121] and Aftermath

The Union resubmitted its June 4 and July 16 proposals, and the Company resubmitted its last and final offer of July 16. At this meeting, many of the statements were in the form of accusations. Attorney Mason mentioned that if the Union refused to make any changes, the parties might be at an impasse.

By letter of August 24, Chema repeated that information the Respondent had provided in response to the Union's July 22 and 23 and August 4, 8, and 20 [sic] requests was incomplete as to safety and health and employee wages and job classifications, and he reiterated such requests.[122]

August 27 Meeting[123] and Aftermath

The Union proposed a safety and health provision concerning the OSHA Voluntary Protection Program (VPP). The Respondent resubmitted its July 16 last and final offer. The parties' leveling of accusations against one another continued.

Chema brought up the expiration of health care coverage and expressed the Union's desire to get information as soon as possible so that the situation that had occurred in 2009 would not be repeated. Attorney Mason stated that the Company could not get quotes until 60 or 90 days at the earliest. Rudis requested that the information be provided to the Union as soon as it was available, and Attorney Mason agreed.

After the meeting, Chema requested information concerning the Respondent's compliance with OSHA laws and regulations.[124]

September Correspondence

By September 12 letter to Attorney Mason, Rudis stated that he was assuming the role of the Union's chief negotiator, and he suggested dates for future bargaining sessions.[125] In a series of subsequent correspondence, they discussed their availability, as well as traded accusations concerning their respective positions over past practice concerning union presence at grievance meetings.[126]

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[120] Jt. Exh. 141.

[121] Jt. Exhs. 142, 143.

[122] Jt. Exh. 144.

[123] Jt. Exhs. 146, 147.

[124] Jt. Exh. 145. The attachments appear to represent information that the Company provided in response. In any event, Attorney Mason and Tulencik also sent responses on September 17 and 21, respectively. Jt. Exhs. 155, 159.

[125] Jt. Exh. 148.

[126] Jt. Exhs. 149–154, 156, 157.

September 23 Meeting

Gerchy raised the subject of health insurance coverage. Attorney Mason responded that current coverage expired on October 31, and that the Company was in negotiations with United Health Care (UHC)and another provider, with an increased cost likely. Rudis asked when the Company would have information to share, and Pesta replied by the end of the month. He also stated that the Union would get it the minute that the Company did. Rudi suggested interim bargaining over continued health insurance coverage. Later in the meeting, Attorney Mason stated that there would be an 8.9 percent increase in employees' out-of-pocket costs for UHC but that the company was also looking at Medical Mutual. At some point during the meeting, Attorney Mason stated that the Company was going to be ready by the end of October to institute a new insurance plan for both unit and nonunit employees and that it typically took 30 days for an insurance carrier to process the paperwork.

September 24 Information Request and Response

Rudis sent an email to Attorney Mason, Tulencik, and Pesta, requesting information on medical coverage, including 1) employee census information; 2) any claims over $75,000 during the past 12 months; 3) monthly claim experience for the past 12 months; and 4) monthly enrollment for the past 12 months.[127] He stated that the Union needed an immediate response due to the pending expiration of current medical coverage.

Tulencik responded by letter of September 29, providing information that the Company maintained and indicating that other information was not available.[128] It did not have information about nonunit employees or medical and drug expenses.

October 5 Meeting and Aftermath

The day before the meeting, via an email, the IAM Benefits Trust Fund advised Rudis that in order for the fund to provide a binding quote, it would need a completed medical profile form and a benefit summary of current benefits, and that the cost of the current plan would be "exceedingly helpful."[129]

At the meeting, the Respondent proposed the following, as described by Colston and Taylor.[130] There would be a 14-month health care plan beginning on November 1 and ending on December 31, 2011, with a 10.7 percent increase from the current plan, shared 25 percent by the employee and 75 percent by the employer in the base plan. Rudis said that he was not happy at not being provided information for the total number of bargaining and nonunit employees using the plan, because it was a combined plan, and the Union needed information for both groups to "value" the program.[131]

Rudis testified that Pesta stated that the Company would accept only a single proposal that included nonunit employees. Pesta denied saying this. Gerchy's notes reflect that Pesta said that the Company would not entertain a proposal that would provide for no increase to unit

[127] Jt. Exh. 161.
[128] Jt. Exh. 163.
[129] GC Exh. 27.
[130] See Jt. Exh. 165; Jt. Exh. 177 at 2, 3.
[131] R. Exh. 2 (Wahoff's notes); R. Exh. 264 at 113 (Gerchy's notes).

employees but an almost 16 percent increase for those not in the unit.[132] Wahoff's notes on the point are more summary in nature. In all of the circumstances, especially considering that Gerchy's notes were taken at the time, I find them to be the most accurate account of what Pesta said.

After the meeting, Rudis sent Pesta an email, stating that he had spoken with Wahoff and had follow-up questions, 1) the total number of plan participants, including unit and nonunit employees; and 2) how many dependents were covered in the plan.[133] He also sent Attorney Mason a letter requesting additional information in order for the Union to understand the specifics of the Company's proposal and to provide a timely response.[134] He asked for non-bargaining unit employees using the plan, because it was a combined plan, and the Union needed information for both groups.

Attorney Mason replied by letter of October 7.[135] He stated that a summary of the current plan would be provided at the next day's negotiations but that medical profiles of individual employees would not be furnished. He further said that the Company had requested information from the insurance company that would enable the Union to get quotes for the unit but that he doubted the Union could secure coverage for employees this late in the process. Attorney Mason also stated that the number of covered unit employees and dependents would be furnished to the Union the following day but that the Union did not represent nonunit employees, for whom the Company intended to secure health insurance coverage. Finally, he said that the Respondent was "declaring an emergency regarding the insurance for the bargaining unit," because there had to be an agreement with an insurance carrier by October 15, since the normal enrollment period was 30 days before the effective date (which would be November 15).

Rudis responded by an October 7 email, complaining about the way the Company had notified the Union about its health insurance proposals and stating that the Union had made repeated requests for such information prior to September 23.[136] He further stated that it was the Company's determination to include nonunit employees and that without the needed information, the Union was unable to rate and determine if the Company's proposal had merit. Rudis also sent an email that day to Reilly, repeating his request for copies of the current summary plan and the new summary plan, as well as the other information in the October 5 information request.[137]

October 8 Meeting and Aftermath

The Union made a group health insurance proposal that the parties agree, commencing on November 1, to retain the current health care coverage without any changes for the full term of the negotiated contract; the Union further proposed a joint labor-management health and hospital benefits provider search committee.[138] The Company provided benefit summaries for the new 14-month health insurance plan and how it compared with the existing plan. Wahoff

[132] R. Exh. 264 at 113–114.
[133] Jt. Exh. 164.
[134] Jt. Exh. 167.
[135] Jt. Exh. 168.
[136] Jt. Exh. 169.
[137] Jt. Exh. 170.
[138] Jt. Exhs. 171, 172.

stated that the cost would go up 16 percent with the grandfathered carrier, but only 10.7 percent with the new 14-month plan.

Attorney Mason responded on October 11, rejecting the Union's proposal and resubmitting its 14-month insurance proposal.[139] He reminded the Union that the parties had until October 15 to agree upon insurance. That same day, Wahoff emailed Rudis the dates the Company had received insurance information regarding renewal.[140]

October 14 Meeting and Aftermath

The Union made another group health insurance proposal, conditionally agreeing to the Company's proposed 14-month group health care coverage commencing on November 1.[141] The conditions were: 1) On November 1, the Respondent institute the Union's wage proposal of June 4 retroactive to November 1, 2009; 2) no later than November 15, the Respondent agree to meet with the Union for the purpose of forming a joint labor-management health and hospital benefits provider search committee and then work cooperatively to obtain comparable coverage at competitive rates. Taylor provided the number of unit employees in both the standard and premium health insurance plans.

By letter dated October 14, Attorney Mason rejected this offer and resubmitted the Company's 14-month insurance proposal originally submitted to the Union on October 5.[142]

On October 15, Attorney Mason sent Rudis a letter, stating that having received no further union proposals for health insurance, he was declaring an impasse and unilaterally implementing the Company's last offer, rather than leave unit employees with no health insurance.[143] Accordingly, he had notified the insurance company of the Respondent's acceptance of its proposal and requested that it begin their enrollment as soon as possible.

Rudis replied by letter of the same date, stating that the Union believed the subject was still open and on the table, and suggesting that the Company maintain the status quo until such time as they reached an agreement.[144] He criticized the way Attorney Mason had handled the matter.

Later that day, Attorney Mason responded, objecting to Rudis' characterization of his motives and repeating that the Respondent had only the two options he described in his earlier letter.[145]

By letter of October 20 to Attorney Mason, Rudis again requested that the Respondent maintain the status quo without modification until such time as the parties reached agreement, and proposing meeting in negotiations until the group insurance matter was resolved.[146] Attorney Mason, by letter of October 28, replied that there was no need to meet on insurance

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[139] Jt. Exh. 173.

[140] Jt. Exh. 174. Apparently, Company representatives met with the current insurance carrier on August 26 and were advised of a 17 percent increase in costs.

[141] Jt. Exhs. 175, 176.

[142] Jt. Exh. 177.

[143] Jt. Exh. 178.

[144] Jt. Exh. 179.

[145] Jt. Exh. 180. The new plan went into effect on November 1.

[146] Jt. Exh. 181.

because the Respondent had unilaterally implemented its proposal on October 15 for 1 year.[147] In response, Rudis sent a letter later that day, contending that the Respondent had refused to provide necessary information in a timely manner and unlawfully unilaterally implemented the new group health care plan.[148]

November 4 Meeting

The Union proposed that it would agree to the Company's October 14 group health care coverage, conditioned under reimbursement retroactive to November 1 to employees for their increased out of pocket costs, and establishment of a joint labor-management health and hospital benefits provider search committee.[149]

November 7 Meeting and Aftermath

The Union presented a proposed complete agreement, incorporating its prior proposals and providing that the Company bear all expenses for group health insurance except for a $15 per pay period for single coverage and $25 per day for family coverage, to be paid by employees.[150] Rudis stated that he was not satisfied with the Company's proposed new plan because of its extra costs and benefit limitations.

Attorney Mason, by letter of November 7, repeated that health insurance was a moot issue and submitted a last and final offer incorporating the Respondent's previous proposals.[151]

November 11 Meeting

The Union proposed another complete agreement,[152] substantially similar to the one it proposed on November 4, with a few modifications or additions. Tulencik's notes of November 11 and December 8 reflect that the Respondent also submitted a last and final offer, but it is not in the record.

Attorney Mason suggested that the parties were at impasse, to which Rudis voiced disagreement. Attorney Mason stated that the Union had given no proposals on health insurance from a carrier even though the Company had provided it with the information. Rudis responded that the Union had been unable to get quotes because the Company had a combined plan. The parties engaged in extensive discussions regarding safety and health.

November 11 Information Request and Response

Rudis requested all correspondence that the Respondent had had with insurance carriers, including their responses and bids.[153]

By letter of November 11, Attorney Mason stated that he saw no movement toward any

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[147] Jt. Exh. 182.
[148] Jt. Exh. 183.
[149] Jt. Exh. 184.
[150] Jt. Exh. 185.
[151] Jt. Exh. 187. Rudis responded in a letter of November 7, repeating his earlier contentions. Jt. Exh. 186.
[152] Jt. Exh. 188.
[153] Jt. Exh. 189.

agreement, that the parties were at an impasse, and that further negotiations were unnecessary.[154] He re-sent the Respondent's last and final offer of November 7.

2011 Meetings

In January 2011, the parties held several meetings, with Reilly present in lieu of Attorney Mason. They discussed union security, mitigation of the Respondent's liability from pension fund withdrawal, and health insurance. At the January 26 meeting, Reilly presented a contract proposal, according to both Wahoff's and Gerchy's notes, but it is not in evidence.

On February 7, 2011, Pesta provided the Union with information that included census information for all employees, unit and nonunit; all types of coverage they had (employee only, employee-spouse, and employee-family); and the totals of their medical and drug coverage.[155]

The Respondent's Basis for Eliminating the Union-Security and Dues-Checkoff Provisions

Statements made during negotiations were covered above. Former Manager Shepherd was the sole witness with first-hand knowledge of this matter to testify on the Respondent's behalf. He interviewed about 25–30 applicants for the mechanic position for the 3-year period prior to October 31, 2009. Of the approximately 20 who were offered positions, 13 declined. Of those, about half cited union considerations and other factors such as benefits (wages) and shift preferences. None of those who gave reasons for their declination cited only union dues. The other 50 percent provided no reasons. He reported to Reilly that the number one reason for declinations was wages, the second union considerations.

Technician Danhauer had a prehire interview with Teresa Pekarcik of human resources in early November 2009. In relevant part, she asked if he would be willing to work there if the shop was not union, and he replied yes.[156]

Applicant Dorr applied for the entry-level mechanic position in 2009. Pekarcik interviewed him. In relevant part, she asked if he wanted to pay union dues, and he replied that he would prefer not to but that it would not be a determining factor in whether he would take the job.

The Respondent's Memoranda to Employees

During the lengthy process of negotiations, the Respondent issued to employees nine memoranda on the subject.[157] The Union also circulated such memoranda, four of which are in evidence.[158]

The General Counsel alleges that three of the Respondent's memoranda misrepresented the status of negotiations, had the effect of disparaging the Union so as to

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[154] Jt. Exh. 192.

[155] GC Exh. 29.

[156] Based on his testimony at Tr. 540, as refreshed by the NLRB affidavit he gave on November 9 with his personal attorney present. GC Exh. 18.

[157] GC Exhs. 14–16 (those the General counsel contends unlawful) & R. Exhs. 206–208, 212, 213.

[158] R. Exhs. 215, 216, 244, 245.

undermine employee support for the Union, and/or interfere with the Union's internal processes: the March 12, April 2, and July 16 "negotiations update."

The March 12 memorandum, from Pesta, stated, inter alia, the following. On January 7, the parties were very close to agreement, with the Union having agreed to freeze wages the first year, terminate the pension plan, and take the $2.55 from the pension contribution and place it into the basic wage rate, if the Company continued a closed shop and mandatory dues deductions. The Company rejected that offer. Since then, the Union had refused to drop those two issues. The Union had other contracts with open-shop provisions. On March 10, the Company increased its wage proposal to add a 1.25 percent increase on top of the $2.55. The Company also made a "last and final" proposal and asked the Union to submit it to employees as soon as possible; "We urge you to vote for this proposal."

The memorandum went on to say why employees should vote for the proposal; that since January 7, the Union had submitted proposal after proposal; that by its latest mailer, the Union was preparing for a strike, claiming the Company had not bargained in good faith (a charge that the NLRB had dismissed); and that the normal practice was that a union would take a company's last and final offer to the membership for a vote, but the Union had advised the Company that it would not do so.

The April 2 memorandum, again signed by Pesta, stated that the Federal mediator had withdrawn from negotiations. It listed 15 new items that the Union put on the table after January 7, stating that each new proposal placed the parties further apart from a new agreement, that the Company had rejected them since they were TA'ed or not an issue as of January 7, and that the Company continued to resubmit its last and final offer and requested a vote by the members thereon. It went on to repeat that the only issues on January 7 were the open shop and dues deductions and that the Company had raised its wage proposal since then. The memorandum ending by urging employees to notify the Union that they wanted a vote on the Company's last and final offer, saying that the Company could not force such a vote but urged employees to vote for it.

Reilly and Pesta signed the July 16 negotiations update. It stated that on June 4, the Union made an entirely new proposal, scrapping all of the past TA's and rewriting almost everything in the contract, in essence starting negotiations from scratch. The memorandum accused the Union of engaging in surface bargaining, over which the Company would be filing an ULP charge. It further said that the Union had filed numerous ULP charges, which had been dismissed by the NLRB and withdrawn by the Union. Finally, the memorandum reiterated what the March 12 memorandum stated about the status of negotiations on January 7.

The Union had previously filed charges against the Respondent. At the time the July 16 memorandum was issued, the Region had dismissed the 8(a)(3) allegations, but the bargaining charges against the Respondent remained pending.[159] The Union subsequently withdrew them.[160]

[159] GC Exh. 25.
[160] GC Exh. 26.

Analysis and Conclusions

The 8(a)(3) Allegations

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under the *Wright Line* framework, if the General Counsel makes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. Once this is established, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in absence of the protected activity. *NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393, 399, 403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

Mason's Discharge

Mason was delegate to the Union's district office and chief steward for the West Facility at the time of his termination. As a member of the Union's negotiating committee, he had attended bargaining sessions on a regular basis from September 2009 until approximately August. Thus, Mason engaged in union activity of which the Respondent had knowledge.

There is no direct evidence of employer animus against Mason due to his union activities. I do note, however, the following. Shepherd told Ward in January that his reprimand was related to the Union's "starting shit at negotiations" and came at the direction of Shepherd's superiors. Quite similarly, Ray more or less told Ward that higher management, i.e., Reilly and/or the Company's counsel, had directed him to terminate Mason.

This leads me to cite the principle that inferences of animus and discriminatory motivation can be warranted under all the circumstances of a case, even in the absence of direct evidence. *Electronic Data Systems Corp.*, 305 NLRB 219, 219 (1991), enfd. in relevant part 985 F.2d 801, 805 (5th Cir. 1993); *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992).

In determining whether animus can be inferred, a dischargee's long duration of employment is a factor to consider, as is whether he was considered a good employee. *Rood Trucking Co.*, 342 NLRB 895, 900 (2004). In this regard, Mason was employed for over 10 years. Moreover, the Respondent's progressive discipline procedure, more specifically the handbook, provides that the employee's length of service is a factor in determining the penalty to be imposed for misconduct.

That the Respondent allowed Mason to continue to work from early July 2009, through November 30, 2010, or approximately a year and 5 months after he lost his CDL must lead to the conclusion that management thought highly enough of his performance to keep him for a long period without it. Although Ray was not a reliable witness overall, he testified at one point that he afforded Mason special treatment in allowing him to work during his 30-day suspension because of "his value to the company as an employee," testimony that can be construed as an admission. I therefore conclude that Mason was a long-term and well-regarded employee.

The timing of the discharge is also suspicious, not vis-à-vis when Mason engaged in union activity but in other respects. He was terminated the same afternoon that Mosholder suspended him without pay until he reacquired his CDL and told him that he could still use a company vehicle to take the test the following day. Although the Respondent had allowed him to work for 17 months without the CDL, it would not afford him 1 additional day to take the test beyond the 30-day time period he had been given.

The Respondent provided evidence that new employees who were hired without having a CDL were required to obtain one, pursuant to the terms of the collective-bargaining agreement. However, the Respondent offered no evidence to show that it ever discharged employees who had the CDL but lost it during the course of their employment. Past practice was that such employees were suspended without pay pending their reacquisition of the CDL, but they were not terminated. Moreover, they were allowed to return to work once they had obtained it, in contrast to the Respondent's refusal to reemploy Mason after he did so. Such evidence of disparate treatment of Mason and the Respondent's deviation from past practice supports an inference of unlawful motivation. See *Case Farms of North Carolina, Inc.*, ibid; *Sysco Food Services, LLC,* ibid.

Finally, the post-discharge conversation between Ray and Ward clearly indicated that Ray was directed to discharge Mason and did not do so on his volition, strongly suggesting that the termination was based on reasons other than Mason's job performance.

The circumstances described above lead me to conclude that the actions of the Respondent prior to the termination were inconsistent with the alleged basis for it, leading to an inference of improper motive. See *Case Farms of North Carolina, Inc.*, 353 NLRB 257, 260 (2008); *Sysco Food Services, LLC,* 343 NLRB 1183, 1184 (2004). I therefore further conclude that the General Counsel has established the element of animus for the Respondent's discharge of Mason and thus satisfied all of the elements necessary to establish a prima facie case.

The next step is to determine whether the Respondent has met its burden of persuasion to show that it would have taken the same adverse action even in the absence of the protected activity.

Granted, Mason did not act with the greatest diligence in speedily reacquiring his CDL after he became eligible to apply for it. However, I attribute this in part to the casual manner in which management treated his lack of a license during the period between early July 2009, and

October 29, 2010, at the earliest. Although Mason was eligible to reapply for the CDL on about July 2, the Company took no action to impel him to obtain it until October 29, or almost 4 months later. Further, Mason was allowed to continue to work between October 30 and November 30 and, when he informed Mosholder in late November that he had the driving test scheduled for December 1, Mosholder not only failed to raise any objections but even authorized him to use a company vehicle to take the test.

Ray and Mosholder utterly failed to articulate a cogent, consistent, and convincing account of the reasons that Mason was terminated on November 30. This, along with the factors I set out above, lead to the conclusion that the asserted reason for the discharge—failure to timely reacquire a CDL—was pretextual. In reaching this determination, I also take into account Shepherd's statement that Ward's reprimand was motivated by the Union's stance on attendance at bargaining, in the context of what can well be characterized as bitter negotiations. If the Respondent retaliated against one member of the Union's negotiating committee because of its displeasure at the Union's actions at the bargaining table, it could certainly do the same to another.

In light of the above, I find that the proffered reason for Mason's discharge—his lack of a CDL—was a mere pretext and that antiunion animus motivated the Respondent's action: retaliation against him for being on the Union's negotiating committee, which had taken positions at negotiations that the Respondent did not like. Accordingly, no further analysis of the Respondent's defenses is necessary for, as the Board stated in *Rood Trucking Co.*, 342 NLRB 895, 898 (2004):

> A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where 'the evidence establishes that the reasons given for the Respondent's actions are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). . . .

See also *SPO Good-Nite Inn, LLC,* above.

Accordingly, I conclude that Mason's discharge violated Section 8(a)(3) and (1) of the Act.

The 8(a)(5) Allegations Pertaining to Mason

Another issue is whether the Respondent's discharge of Mason constituted a change in past practice without affording the Union notice and an opportunity to bargain. Related to this is whether the Respondent's refusal to reemploy Mason after he reacquired his CDL was an unlawful change in past practice.

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally makes substantial changes on subjects of mandatory bargaining; to wit, employees' wages, hours, or other terms and condition of employment, without first affording notice and a meaningful opportunity to bargain to the union representing employees. *NLRB v. Katz*, 369 U.S. 736 (1962); *United Cerebral Palsy of New York City*, 347 NLRB 603, 608 (2006).

It is well established that an employer's disciplinary system constitutes a mandatory subject of bargaining. *Toledo Blade Co.,* 343 NLRB 385, 387 (2004); *Migali Industries*, 285

NLRB 820, 821 (1987); *Electri-Flex Co.*, 228 NLRB 847, 847 (1977), enfd. as modified 570 F.2d 1327 (7th Cir. 1978), cert. denied 439 U.S. 911 (1978).

Because I have concluded that Mason's discharge was discriminatory under Section 8(a)(3), and there is no evidence that any other employees were treated differently than in the past, the unilateral change in discipline allegation is essentially subsumed by the 8(a)(3) allegation. In other words, Mason was targeted for union considerations and not treated differently because the Respondent was changing a policy in general. Therefore, I do not conclude it appropriate to find that the discharge itself was also an 8(a)(5) unilateral change.

That said, I do conclude that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to reemploy Mason after he reacquired his CDL, which Reilly admitted to Ward was a change in the Company's policy and over which the Respondent failed to give the Union notice and an opportunity to bargain.

Ward's Reprimand

Ward held several union positions known to management, most notably, chair of the Union's bargaining committee, on whose behalf he spoke regularly at negotiations and made a number of information requests. The elements of union activity and employer knowledge are thus satisfied. Direct evidence of animus is established by Shepherd's statement when he issued the reprimand that higher management had initiated it because of the Union's stance on attendance/tardiness during negotiations. Accordingly, the General Counsel has established a prima facie case under *Wright Line*.

I now turn to the second prong of *Wright Line* and whether the Respondent had met its burden of persuasion to show that it would have taken the same adverse action even in absence of the protected activity.

Adverse action occurring shortly after an employee has engaged in protected activity raises an inference of unlawful motive. *State Plaza, Inc.,* 347 NLRB 755, 756 (2006); *La Gloria Oil & Gas Co*., 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003). The principle applies here in the context of the adverse action vis-à-vis the Union's conduct in bargaining.

On January 18, the Union made a lengthy information request, which included documents pertaining to attendance/tardiness policies. At the January 25 negotiations, Attorney Mason accused the Union of bringing up new subjects to harass the Company, there was lengthy discussion of the Company's attendance policies, and Attorney Mason warned the Union about pursuing an attendance point system. Two days later, in issuing Ward the reprimand for being late on January 26 and 27, Shepherd stated that it constituted higher management's retaliation for the Union's bargaining stance on attendance/tardiness.

Even in the absence of Shepherd's admission, the timing of Ward's reprimand raises suspicion. Thus, after Ward received a written reprimand for attendance on July 28, 2008, he was 5–10 minutes late on three additional occasions in 2008 and 14 times from January–December 2009 (twice during 3 months and three times in another), yet he never received even an oral reprimand. Shepherd offered no explanation of why he overlooked all of these 17 instances. In sum, the timing of Ward's reprimand leads to the conclusion that his tardiness on January 26 and 27 was a mere pretext and not a bona fide reason for discipline.

The severity of the discipline that an employer imposes in proportion to the seriousness of the offenses may also raise a red flag of pretext. See *Detroit Paneling Systems, Inc.*, 330 NLRB 1170, 1170 (2000); *KNTV*, 319 NLRB 447, 452 (1995).

Since the Respondent has a 6-minute grace period for employees punching in, Ward was at most a minute late on January 26, and 2 minutes late the next day—hardly egregious misconduct or dereliction that would justify a written rather than an oral reprimand under the Respondent's progressive discipline system, especially when he was not disciplined at all for being 5–10 minutes late on at least 17 prior occasions. Therefore, I find this to be another indication of pretext.

In view of the above, I determine that the proffered reason for Ward's written reprimand—tardiness on January 26 and 27—was pretextual and that antiunion animus (the same I found for Mason) motivated the Respondent's action. Hence, no further analysis of the Respondent's defenses is necessary. See *Rood Trucking Co.*, supra,

Accordingly, I conclude that Ward's written reprimand violated Section 8(a)(3) and (1) of the Act.

Shepherd's January 27 Statement

Shepherd told Ward and Mason on January 27 that higher management's anger at the Union's bargaining stance on attendance/tardiness was behind Ward's receipt of the reprimand. Such a statement was patently coercive, sending the clear and chilling message that employees serving on the Union's negotiating committee would be punished because the Respondent did not like the way the committee was bargaining.

Accordingly, I conclude that Shepherd's statement constituted an unlawful threat and that the Respondent thereby violated Section 8(a)(1) of the Act.

Announced Unilateral Change in Carrying Over Vacation Days

I previously stated the law with respect to an employer's obligation to provide a bargaining representative with notice and an opportunity to bargain over mandatory subjects of bargaining. Vacation policies are such a subject. *United Cerebral Palsy of New York City*, 347 NLRB 603, 606 (2006); *Blue Circle Cement Co.*, 319 NLRB 954, 954 (1995), enfd. mem. in relevant part 106 F.3d 413 (10th Cir. 1997).

Past practice was that employees could carry over 3 days of vacation leave into the following year, with no restrictions on date. Ray's November 24, 2009 announcement that employees would have to use their carryover days by March 31 was a clear change in this past practice. The Respondent admittedly never gave the Union notice or an opportunity to bargain over such a change.

True, the change was rescinded before it was put into effect, and thus no unilateral change ever occurred. Nevertheless, the Board has held that an announced unilateral reduction in employee benefits in and of itself damages the bargaining relationship and violates Section 8(a)(5) of the Act, even in the absence of implementation. *Kurdziel Iron of Wauseon,* 327 NLRB 155, 156 (1998), enfd. 208 F.3d 214 (6th Cir. 2000); *ABC Automotive Products Corp.,* 307 NLRB 248, 250 (1992).

Ergo, I concude that the announced unilateral change in carryover of vacation day violated Section 8(a)(5) and (1) of the Act.

The Respondent's Memoranda of March 12, April 2, and July 16

The General Counsel contends that these memoranda misrepresented the status of negotiations, disparaged the Union so as to undermine employee support for the Union, and/or interfered with the Union's internal processes, evidencing bad-faith bargaining and independently violating Section 8(a)(1). The General Counsel does not expressly assert that they constituted an attempt at direct bargaining with employees, but I will consider that an implied argument. The memoranda essentially criticized the Union's conduct during negotiations and accused the Union of surface bargaining and of filing meritless charges, in the context of urging employees to support the Respondent's last and final offer in a ratification vote.

Under Section 8(c), an employer has a fundamental right to communicate with its employees concerning its position in collective-bargaining negotiations and the course of such negotiations. *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985), enfd. sub nom. *NLRB v. Pratt & Whitney Air Craft Division*, 789 F.2d 121 (2d Cir. 1986) ("An employer is not required to watch passively as a union conducts 'public' negotiations through one-sided distributions which denigrate the employer, raise expectations, and engender fear that the employer's position is sinister or unfair.").

However, such right is not absolute. An employer's communication cannot be coercive or undermine the statutory collective-bargaining representative by directly bargaining with employees. *Armored Transport, Inc.*, 339 NLRB 374, 376 (2003); *Putnam Buick*, 280 NLRB 868, 869 (1986), affd. 827 F.2d 557 (9th Cir. 1987). A review of precedent reflects that this determination is generally made based on an analysis of all of the facts and circumstances present, rather than on one single overriding element of paramount importance. See *Armored Transport*, above at 378.

The General Counsel specifically points to two misrepresentations of fact: the March 12 memorandum incorrectly stated that the parties were only two issues away from reaching an agreement as of January 7; and the July 16 memorandum erroneously stated that all of the Union's charges had been withdrawn or dismissed. GC Br. at 69, 86.

Misrepresentations of contract proposals do not necessarily violate Section 8(a)(5) and (1) as evidencing an intent to bypass, undermine, or subvert the union, or constitute independent violations of Section 8(a)(1). *Adolph Coors Co.,* 235 NLRB 271, 276–277 (1978). See also *McClatchy Newspapers*, 307 NLRB 773, 773 (1992). In terms of Section 8(a)(5), the test is whether the nature of the misrepresentations was calculated to create the impression that the Respondent was the true protector of the employees' interests, or was part of an unlawful bargaining table strategy. *Adolph Coors*, above at 277. As far as an independent 8(a)(1) violation, the misstatement must contain a threat, express or implied, to interfere with employees' rights, or promise benefits. *Laverdiere's Enterprises*, 297 NLRB 826, 826 (1990), enfd. in part 933 F.2d 1045 (1st Cir. 1991); see also *Daniel Construction Co.,* 257 NLRB 1276, 1276 (1981), enfd. 732 F.2d 139 (1st Cir. 1984), and *Adolph Coors*, ibid.

I conclude that the two cited misrepresentations did not expressly or implicitly threaten employees or promise them benefits and that they were not in any other way coercive of employees' rights. Nor, in the context of the length of negotiations can they be deemed to have been part of a bargaining strategy to undermine the Union. I note that although they were not

entirely accurate, neither misstatement was based on total fabrication. Thus, the parties were several issues apart, rather than two, on January 7; and as of July 16, the Region had dismissed some charges and had not issued complaint on the others, which the Union subsequently withdrew. In short, the two misstatements appear to have been inadvertent errors, at most exaggerations, as opposed to glaring falsehoods made to mislead employees.

An important indication of direct bargaining is that the employer's communications set forth proposed contract terms which it had not presented to the union. See *Armored Transport*, above at 377; *United Technologies Corp.*, above at 1074. That did not happen here.

Turning to the alleged disparagement of the Union, as a general proposition, an employer's words of disparagement alone pertaining to union officials are insufficient to constitute violations of Section 8(a)(1), absent other coercive statements, since "It is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations," *Trailmobile Trailer, LLC,* 343 NLRB 95, 95 (2004), citing *Sears, Roebuck & Co.*, 305 NLRB 193, 193 (1991); see also *Atlas Logistics Group Retail Services (Phoenix) LLC*, 357 NLRB No. 37, slip op. at 1 (2011). I am not entirely convinced that the memoranda can be characterized as "derogatory" to the Union but, in any event, I conclude that they were not otherwise coercive.

Disparagement of the union is also a factor that is considered in determining whether the employer's communications seek to undermine the union's role as collective-bargaining representative. *Armored Transport*, above at 377–378, 379 fn. 9. In view of the tone of the Union's memoranda and the three memoranda read in their totality, I cannot conclude that the latter rose to the level of undermining employee support for the Union.

Finally, as to the Respondent's alleged interference in the ratification process, urging employees to discuss the course of negotiations with their union representatives and to attend and participate in the ratification vote is permissible. Ibid. On the other hand, contract ratification votes and procedures are "internal union affairs upon which an employer is not free to intrude." *London Chop House, Inc.,* 264 NLRB 638, 639 (1982); see also *Sheridan Manor Nursing Home,* 329 NLRB 476, 477 (1999). However, the facts of both of those cases, in which violations were found, are distinguishable. *London Chop House* dealt with the termination of an employee who opposed ratification. The employer's memorandum in *Sheridan Manor* solicited employees to oppose the union's announced procedure for ratification and discouraged membership in the union, and the Board found it relevant that "the memorandum did in fact disrupt the ratification procedure." Ibid.

I conclude that the Respondent's statements urging employees to notify the Union that they wanted a ratification vote on the Respondent's proposed agreement did not amount to unlawful interference in the ratification process or violate Section 8(a)(5) or (1) independently.

Based on the above, I recommend dismissal of the charges relating to the memoranda in question.

Issues Pertaining to Health Insurance Benefits

The failure to provide information allegation concerns health insurance benefits and is interrelated with the alleged unilateral change in such in 2010.

I earlier stated the applicable law concerning unilateral changes. I now turn to that regarding an employer's obligation to furnish information.

An employer is obliged to supply information requested by a collective-bargaining representative that is relevant and necessary for the latter's performance of its responsibilities to the employees it represents. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). When the requested information concerns terms and conditions of employment of bargaining-unit employees, that information is presumptively relevant, and the respondent must provide it. *Chrysler, LLC,* 355 NLRB No. 54, slip op. at 13 (2010); *Contract Flooring Systems*, 344 NLRB 925, 928 (2005). Indisputably, health insurance is an important term and condition of employment. *KSM Industries*, 336 NLRB 133, 136 fn. 6 (2001); *ABA Automotive Products Corp.*, 307 NLRB 248, 250 (1992), supplemented 319 NLRB 874 (1995). The employer must furnish the information in a timely fashion. *Beverly California Corp.*, 326 NLRB 153, 157 (1998); *Interstate Food Processing*, 283 NLRB 303, 306 (1987).

Several factors lead me to conclude that the Respondent unlawfully unilaterally implemented new health insurance benefits and failed in its duty to timely provide information on such. First, in 2009, the Respondent announced proposed changes in health insurance on October 1, including a change in carrier on October 15 and in benefits on November 1—affording the Union little opportunity to meaningfully negotiate or seek alternative carriers. As a result, on October 15, 2009, just 2 weeks after proposing the health insurance changes, the Respondent declared impasse and unilateral implementation. In light of this, I would reasonably expect that the Respondent in 2010 would have been more diligent in earlier furnishing the Union with information and in negotiating over any changes in health benefits. Yet, the Union was the party to initiate discussion on the subject, on August 23, 2010, expressing concern that there not be a repeat of what had occurred in 2009.

Second, although the Respondent indicated that insurance coverage for both unit and nonunit employees was connected, information on both was necessary for the Union to secure a binding quote, and the Union requested such information on September 24, the Respondent did not provide information on nonunit employees until February 11, 2011. The same holds true for census information and other information that the Union requested on September 24. The Respondent offered no explanation of why the information was available by February 11, 2011 but not before then.

Third, the Respondent declared an "emergency" on October 5 and an impasse on October 15 without having afforded the Union the benefit of information that would have enabled it to get alternative quotes.

In sum, the Respondent bore the responsibility for creating the emergency situation that it proclaimed was necessary for unilateral implementation of new insurance coverage.

As stated above, the Respondent, on February 11, 2011, provided additional health insurance which, in combination with information that the Respondent earlier provided, appears to have responded fully to the Union's September 24 request. The General Counsel's brief does not contend otherwise.

Accordingly, I conclude that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing new health insurance benefits on November 1, 2010. I further conclude that the Respondent violated Section 8(a)(5) and (1) by, after on about September 24, 2010, failing to timely furnish the Union with relevant and necessary information pertaining to such benefits.

Bad-Faith or Surface Bargaining

The final—and most analytically complex—issue is whether the Respondent engaged in bad-faith or surface bargaining; put another way, went through the motions of bargaining without any intention of reaching an agreement.

In deciding whether an employer engaged in legitimate "hard bargaining" or unlawful surface bargaining, the totality of the employer's conduct is examined, including its conduct both at and away from the bargaining table, and the proposals themselves. *U.S. Ecology Corp.,* 331 NLRB 223, 225 (2000), enfd. 26 Fed. App. 435 (6th Cir. 2011) (unpub.); *Regency Service Carts*, 345 NLRB 671, 671 (2005); *Liquor Industry Bargaining Group,* 333 NLRB 1219, 1220–1222 (2001), enfd. 50 Fed.App. 444 (D.C. Cir. 2002) (unpub.).

Determining where "hard bargaining ends and obstructionist intransigency begins" is "an inescapably elusive inquiry." *NLRB v. Big Three Industries*, 497 F.2d 43, 46 (5th Cir. 1974). As the Board stated in *Borg-Warner Corp.,* 198 NLRB 726, 726 (1972), "[N]o case involving an allegation of surface bargaining presents an easy issue to decide."

My role is to ascertain the Respondent's state of mind during negotiations, not to substitute my judgment with respect to the substantive terms that were proposed by the parties. See *NLRB v. American National Ins. Co.,* 343 U.S. 395, 402 (1952); *Tritac Corp.,* 286 NLRB 522, 523 (1987).

The General Counsel contends that the Respondent's actions at and away from negotiations constitute evidence of bad-faith bargaining. I have found that the Respondent committed several ULP's at the facility and will consider them in weighing the totality of circumstances. The General Counsel further asserts that the Respondent's bad-faith bargaining is demonstrated by its "overall conduct" at the bargaining table, including proposing in bad faith, elimination of the union-security provision and voluntary check-off clause; repeatedly submitting its prior proposals in response to new union proposals; and giving perfunctory consideration to and/or failing to consider union proposals.

Preliminarily, I note that an employer's proposals for elimination of union security and dues checkoff are not per se indicative of bad-faith bargaining. *Logemann Bros. Co.,* 298 NLRB 1018, 1020 (1990); *Challenge-Cook Bros.,* 288 NLRB 387, 388 (1988). Rather, the question is whether the reasons advanced for the proposal to eliminate them are "so illogical as to warrant an inference that . . . Respondent has evinced an intent not to reach agreement . . . in order to frustrate bargaining." *Phelps Dodge Specialty Cooper Products Co.,* 337 NLRB 455, 457 (2002), citing *Hickinbotham Bros. Ltd.*, 254 NLRB 96, 102–103 (1981); see also *National Steel & Shipbuilding Co.*, 324 NLRB 1031, 1044 (1997).

Similarly, withdrawal of a proposal or tentative agreement, or adherence to a proposal do not necessarily evince bad-faith bargaining. *Logemann Bros.* at 1020; *Challenge-Cook Bros.* at 389.

In the Respondent's favor, the parties met over 50 times between September 2009, and January 2011 and engaged in lengthy discussions over their respective proposals, reaching some agreements. See *Tritac Corp.*, supra at 524 fn. 5. Moreover, although the Union made most of the concessions, the Respondent did modify its original proposals on several subjects, including pension, wage increases, and health care in response to the Union's counter-proposals.

Contrariwise, I have found that the Respondent committed a number of ULP's related directly or indirectly to the bargaining; the Respondent demonstrated a general unwillingness after January 7 to accept or to offer counter-proposals to the Union's new proposals, instead usually resubmitting its last offer; and Reilly rejected Chema's oral proposal on January 7 that if the Respondent agreed to union-security and dues-checkoff provisions, the Union would accept the rest of the Company's proposal in its entirety, including both health insurance and cessation of the pension plan.

I also take into account the following. After January 7, the Union made numerous new proposals and information requests on an ongoing basis. Although the Union certainly had a legal right to do so, these actions complicated negotiations and were perceived by the Respondent as harassment. In any event, they obviously did not bring the parties closer to a final agreement and had the effect of prolonging negotiations. Moreover, the tenor of negotiations grew increasingly strained as time went on, to the point where both parties demonstrated something of a retaliatory stance and many of the exchanges consisted of personal attacks rather than discussion of the merits of proposals.

I have carefully considered the many factors present in this case and conclude that, on balance, they weigh against the Respondent. Three considerations are especially determinative in reaching this decision.

The first is that during the course of negotiations, the Respondent committed ULP's directly or indirectly related to the bargaining, including discrimination against two members of the Union's negotiating committee, threatening them because of their membership on that committee, making unilateral changes in health insurance benefits, and failing to timely provide relevant and necessary information on health insurance. Contrast *Litton Systems*, 300 NLRB 324, 330 (1990) (unilateral changes not linked to ongoing negotiations).

The cumulative effect of these ULP's on the bargaining relationship cannot by any reasonable stretch of the imagination be deemed de minimis or trivial. Regarding the unilateral change in health insurance coverage that resulted in decreased benefits to employees, the Board, in *Intermountain Rural Elec. Ass'n,* 305 NLRB 783, 789 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993), found that the employer's unlawful implementation of new terms and conditions affecting take home pay precluded a lawful impasse, stating:

> [Those changes] were not isolated or insignificant matters, but rather were areas in which the entire bargaining unit was affected in the most fundamental way—in their paychecks. These actions would likely place the union at a serious bargaining disadvantage in terms of maintaining the support and trust of the employees. This would serve to undercut the Union's authority at the bargaining table.

Similarly, in the context of a declared impasse, the Board has recognized the detrimental impact that discharging members of the union's negotiating committee can have on the Union's ability to bargain: "[It] would tend not only to hinder the committee's ability to negotiate, but also would reasonably lead it to believe that its very existence was under attack." *Dynatron/Bondo Corp.,* 333 NLRB 750, 756 (2001).

The second is the Respondent's rejection of Chema's oral proposal on January 7. Significantly, this occurred before the Union began submitting a series of new proposals and information requests and the argument could be made that the Union was at least partially responsible for the parties' failure to reach an agreement. The Respondent's summary rejection

of an informal offer that essentially would have given the Respondent all of the contractual changes it wanted as far as provisions directly affecting its business operation strongly suggests that the Respondent's intent was not to reach an agreement with favorable economic terms but to discourage the Union from continuing to represent unit employees. Reilly did not testify and therefore did not offer another explanation. Additionally, the evidence that the Respondent presented failed to show that its ability to hire mechanics was seriously affected by the union dues requirement. In fact, the foremost reason voiced by those who turned down job offers was the pay that the Respondent offered.

The third is Shepherd's statement that higher management was issuing Ward a reprimand as retaliation for the Union's conduct in negotiations, and Ray's nonverbal assent to Ward's accusation that higher management was behind Mason's discharge, which I have found unlawful. These actions by managers raise the suspicion that top management (Reilly) had an antagonistic attitude toward the Union rather than a desire to continue the parties' collective-bargaining relationship in a harmonious manner.

Accordingly, based on the totality of circumstances, I conclude that the Respondent engaged in surface or bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act. Having reached this conclusion, I need not further address the other conduct of the Respondent that the General Counsel contends reflected bad-faith bargaining.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Russ Mason and issuing a written reprimand to Jeff Ward, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.
4. By making unilateral changes in health insurance benefits and in the practice of reemploying mechanics who reacquire their CDL's, announcing a unilateral change in vacation carryover days, failing to timely provide the Union with information it requested regarding health insurance benefits, and engaging in surface bargaining, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.
5. By threatening employees with discipline as retaliation for their membership on the Union's negotiating committee, the Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

Remedy

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Since the Respondent discriminatorily discharged Russ Mason, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), with an applicable rate of interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel seeks additional remedies for Mason regarding the manner in which he should receive backpay (GC Br. at 98). The General Counsel also seeks an order prohibiting the Respondent from stating to any employer, prospective employer, or responding to any credit, reference or similar inquiry that Mason was discharged for cause. Ibid. The General Counsel's position may be meritorious but, in the absence of any Board decisions adopting such remedies, I decline to order them.

Since the Respondent unilaterally implemented new health insurance benefits and changed the policy of reemploying mechanics who reacquire their CDL's, the Respondent shall be ordered to make any unit employees whole for any loss of earnings and other benefits they may have suffered. The make-whole remedy shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest compounded daily, *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), with an applicable rate of interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Since the Respondent failed to bargain in good faith, the Respondent shall be ordered to meet with the Union and bargain in good faith concerning the terms and conditions of employment of bargaining unit employees and, if an agreement is reached, embody such agreement in a signed contract.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[161]

ORDER

The Respondent, Center City International Trucks, Inc., Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, reprimanding, or otherwise discriminating against any employee for engaging in activities on behalf of the International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 54, Local Lodge 1471 (the Union) or to retaliate against them for positions on terms of employment that the Union has taken during collective bargaining.

(b) Threatening employees with discipline as retaliation for their membership on the Union's negotiating committee.

(c) Making or announcing any changes in terms and conditions of employment without first affording the Union notice and an opportunity to bargain.

(d) Failing to timely provide the Union with information it requests that is relevant and necessary for it to fulfill its role as a collective-bargaining representative.

(e) Bargaining without a good-faith intent to reach agreement on a new collective-bargaining agreement.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[161] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Russ Mason full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Russ Mason whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Russ Mason, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days from the date of the Board's Order, remove from its files any references to the unlawful written reprimand issued to Jeff Ward, and within 3 days thereafter notify him in writing that this has been done and that the reprimand will not be used against him in any way.

(e) Bargain in good faith with the Union as the exclusive representative of all regular full-time and regular part-time mechanics, leadmen, mechanic's helpers, and mechanic's apprentices employed at its two facilities, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(f) On request by the Union, restore the health insurance benefits that existed prior to the unilateral changes that were implemented on November 1, 2010, and maintain those terms until the Union agrees to the changes or the parties bargain to a new collective-bargaining agreement or reach an overall valid impasse.

(g) Make employees whole by reimbursing them, in the manner set forth in the remedy section of the decision, for any loss of benefits and additional expenses they incurred as a result of the unilateral changes in health insurance benefits that were implemented on November 1, 2010.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facilities in Columbus, Ohio, copies of the attached notice marked "Appendix."[162] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices should be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 24, 2009.

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[162] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 2, 2011

_____
Ira Sandron
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

We recognize the International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 54, Local Lodge 1471 (the Union) as the exclusive representative of all regular full-time and regular part-time mechanics, leadmen, mechanic's helpers, and mechanic's apprentices employed at our two facilities (unit employees).

WE WILL NOT discharge, reprimand, or otherwise discriminate against employees for engaging in activities on behalf of the Union or to retaliate against them for positions on terms of employment that the Union has taken during collective bargaining.

WE WILL NOT threaten employees with discipline as retaliation for their membership on the Union's negotiating committee.

WE WILL NOT make changes in health care benefits, in our practice of reemploying mechanics who reacquire their CDL's, or in any other terms and conditions of employment, without first affording the Union notice and an opportunity to bargain.

WE WILL NOT announce changes in our policy of allowing employees to carry over 3 days of vacation leave into the following year without a restriction on dates, or in any other terms and conditions of employment, without first affording the Union notice and an opportunity to bargain.

WE WILL NOT fail and refuse to timely provide the Union with information it requests that is relevant and necessary for it to fulfill its role as the collective-bargaining representative of unit employees, including health insurance benefits.

WE WILL NOT negotiate with the Union without a good faith intent to reach agreement on a new collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Russ Mason full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits he suffered as a result of his unlawful discharge.

WE WILL remove from our records all references to Russ Mason's discharge and to Jeff Ward's unlawful reprimand, and notify them in writing that this has been done and that those actions will not be used against them in any way.

WE WILL bargain in good faith with the Union as the exclusive representative of unit

employees, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL timely provide the Union with information it requests that is relevant and necessary for it to fulfill its role as the collective-bargaining representative of unit employees.

WE WILL, on the Union's request, restore the health insurance benefits that existed prior to the unilateral changes that were implemented on November 1, 2010, and maintain those terms until the Union agrees to the changes or the parties bargain to a new collective-bargaining agreement or reach an overall valid impasse.

WE WILL make employees whole by reimbursing them for any loss of benefits and additional expenses they incurred as a result of the unilateral changes in health insurance benefits that were implemented on November 1, 2010.

CENTER CITY INTERNATIONAL TRUCKS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street, Federal Building, Room 3003, Cincinnati, OH 45202-3271

(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3750.